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THE REVISED REPORTS

BEING

A REPUBLICATION OF SUCH CASES

IN THE

ENGLISH COURTS OF COMMON LAW AND EQUITY,

FROM THE YEAR 1785

AS ARE STILL OF PRACTICAL UTILITY.

EDITED BY

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OF THE INNER TEMPLE, ESQ.

ASSISTANT READER IN EQUITY IN THE INNS OF COURT.

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VOL. XVIII.

1817-1818.

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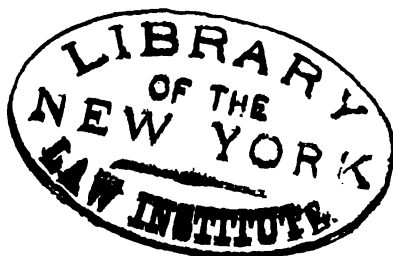
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PREFACE TO VOLUME XVIII.

IN the successive volumes of this series we have to deal with an increasing proportion of cases which, though not of great general importance, are still available as authority, and sometimes the only definite authority on the points decided. Such cases may not be of practical utility to any large number of modern lawyers; but if any learned reader should think he is being incumbered with cases he could well spare, we must ask him to consider whether he would prefer to take an appreciable risk of some day looking in vain for the very case he wants.

The present volume contains at least one decision of first-rate authority at this day, *Crawshay v. Maule*, p. 126; and *Morphett v. Jones*, p. 48, is still both authoritative and instructive on an equitable doctrine, that of part performance, which is easily misunderstood.

Lucas v. Dorrien, p. 480, is a profitable though not a famous case on constructive delivery of goods.

Wolff v. Oxholm, p. 313, shows the limits of the rule according to which municipal courts usually decline to

examine or dispute the acts of a foreign sovereign power done within its admitted jurisdiction. The presumptive obligation of comity (if that be the correct way of putting it) may be outweighed by manifest disregard of the usage of nations in the act complained of. Note that a state of war between the two powers makes no difference. Evidently the Court of King's Bench in 1817 believed that there is a real law of nations, and would not have been much impressed by the denial that there is any such thing which has been fashionable with a certain school in later times.

The curious case of dog-spears, *Deane v. Clayton*, p. 553, is a repertory of discussion rather than a decision, but later decisions have not been positive enough to supersede it. *Jerritt v. Weare*, p. 665, may seem to deal with obsolete matter, but most real property lawyers will agree that such cases are capable of crushing revenges on those who neglect them. At first sight one is tempted to accede to the powerful argument of Preston, and to think that the Court (whose united learning was probably far short of Preston's) decided wrongly. But, although the reasons given are not all of equal value, it seems to us, after consulting Mr. H. W. Challis, who has been good enough to favour us with his opinion, that the result arrived at was correct. For Mrs. Chester, under whose lease the alleged disseisor entered, was privy in title to the grant from which the defendants' title was derived, and she acted with no

adverse intention, but under a mistake of fact as to the parcels included in that former grant. Being thus estopped from disputing the defendants' title, she could not be presumed to have intended to dispute it, but rather to have acted under colour of an authority from the defendants. Accordingly the defendants were free to treat her tenant as their own, and to say that there was never an adverse possession and therefore no disseisin. As it was the obvious interest of the defendants, as maintaining their right to convey to a purchaser, to take this position, the question of disseisin by election did not arise.

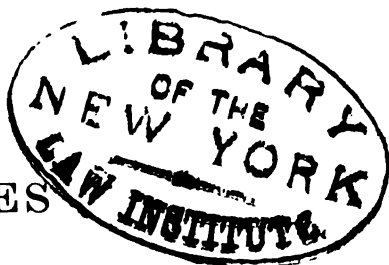
The only recent judicial citation of a case omitted from the Revised Reports of which I am aware is that of *Doe d. Spicer v. Lea*, 11 East, 312, by A. L. Smith, L.J., in *Sidbotham v. Holland*, '95, 1 Q. B. at p. 388, 14 R. Mar. at p. 226. Whatever the value of the case may be, the citation, though brief, appears to give a sufficient account of it for any practical modern purpose.

In the equity jurisdiction of the Exchequer during this period the reports of Price and Daniell run side by side. Price's reports are more commonly cited, but it is hard to see why, for examination of both has shown that Daniell's are always or almost always better.

F. P.







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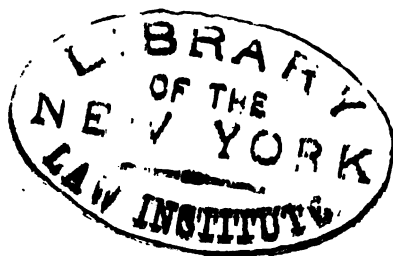


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NOTE.

The first and last pages of the original report, according to the paging by which the original reports are usually cited, are noted at the head of each case, and references to the same paging are continued in the margin of the text.

ADDENDA AND CORRIGENDA.

7 R. R.

Lewis v. Madocks, page 10, footnote. Add reference to *Re Bendy*, '95, 1 Ch. 109, 13 R. Jan. 247, 64 L. J. Ch. 170, where the principal case was followed.

Finch v. Squire, page 337, was questioned in *In re Pickard, Elmsley v. Mitchell*, '94, 3 Ch. 704, 7 R. 479, C. A.: "It is unnecessary for us to express any decided opinion upon the point which has been much argued before us whether the case of *Finch v. Squire* . . . has or has not been overruled; or, if it has not been overruled, whether it ought now to be overruled. . . . But, as the point has been mentioned, I will just say this—that the reasoning of Sir WILLIAM GRANT in *Finch v. Squire* seems to be of rather a refined character, and probably *Finch v. Squire* would not be decided as it was at the present day": *per* DAVEY, L.J., '94, 3 Ch. at pp. 715, 716.

Drake v. Mitchell, page 449. *Cambefort v. Chapman*, 19 Q. B. D. 229, referred to in the editorial note to *Drake v. Mitchell*, 3 East, 251, is now overruled by *Wegg-Prosser v. Evans*, '95, 1 Q. B. 109, 9 R. 830, 64 L. J. Q. B. 1, which follows and confirms the principal case.

15 R. R.

P. 112, line 3 from bottom, *for* "have all the," *read* "have the."

— 113, line 3 from top, *for* "be sued upon such covenants," *read* "be so sued."

— — line 12 from top, *for* "must not pay," *read* "is not to pay."

These corrections are from the reporter's appendix.

17 R. R.

Toulmin v. Steere, page 67. This case is now of authority, if at all, only as a decision on the particular facts before the Court. See the remarks made on it in the House of Lords in *Thorne v. Cann*, '95, A. C. 11, 64 L. J. Ch. 1.

18 R. R.

P. 216, footnote, *for* "21 C. P. Div.," *read* "2 C. P. Div."

The Revised Reports.

VOL. XVIII.

CHANCERY.

COMMERELL *v.* POYNTON.†

(1 Swanston, 1—3.)

1818.
Jan. 12.

ELDON, L.C.

[1]

A solicitor discharging himself is not entitled to compel payment of his costs, by refusing to permit such inspection of the papers in his hands, or such production of them before the Court or the Master, as may be necessary in the conduct of the cause.

DURING the proceedings in the Master's office, preparatory to his report in this cause, disputes having arisen between the defendant and his solicitors, they, on the 29th of November, 1817, wrote a letter to him, desiring him to consider that they were no longer concerned as his solicitors, apprizing him that the plaintiff would, on the day appointed, proceed on his charge, which would be followed by the Master's report; and declaring their readiness to deliver the papers to any person whom he might appoint, on discharge of their accounts.

On the 13th December, 1817, a motion was made by the defendant, that the solicitors might be "ordered to proceed as solicitors in this cause for the defendant to the termination of the same, or that they might, on a short *day to be named by the Court, deliver up to him all his papers in their possession relating to the said cause."

[* 2]

Mr. Cooke, in support of the motion, referred to an anonymous case in *Siderfin*, 31, pl. 8, and to *Cresswell v. Byron*.†

† *Re Faithfull* (1868) L. R. 6 Eq. 325, 327. † 9 R. R. 275 (14 Ves. 271).

COMMERELL
v.
POYNTON.
Jan. 12.
—

Sir Samuel Romilly and Mr. Simpkinson against the motion.

THE LORD CHANCELLOR :

This is a motion of great importance to the suitors in this Court. I should be unwilling to establish a new rule without the concurrence of the Judges, but in this I am quite clear, that no solicitor in this Court can say to a suitor in this Court, I have such a lien on your papers that I will neither deliver them to another solicitor, nor permit another solicitor, whom you may employ, to make such use of them as is necessary for proceeding with the suit. The solicitor who has possession of the papers must allow the new solicitor to see them at all reasonable times ; and must himself attend with them before the Master, or suffer the new solicitor to have them for that purpose. A solicitor cannot, by virtue of his lien, prevent the King's subject from obtaining justice.†

The order directed the solicitors to permit the defendant, or his agents, to inspect the defendant's deeds, papers, and writings in this cause in their possession, at all reasonable times, and on giving reasonable notice, and the defendant was to be at liberty to take copies thereof, or extracts therefrom, as he should be advised, at his own expense ; and the order farther directed the solicitors to produce the said deeds, papers, and writings before the Master, on taking the accounts, and making the enquiries directed by *the decree and at the hearing of the cause for farther directions.

[*3]

† See *Ross v. Laughton*, 12 R. B. 232 (1 Ves. & B. 349).

GEORGE MURLESS, AND BETTY HIS WIFE, v.
MATTHEW FRANKLIN AND RICHARD FRANK-
LIN THE YOUNGER.†

(1 Swanston, 13—20.)

1818.
Jan. 17, 19,
26.

ELDON, L.C.

[13]

A father having purchased in the names of his sons a copyhold estate, which he afterwards demised by licence obtained subsequently to the purchase, the sons take the estate successively, as an advancement. To repel the presumption of advancement, evidence of the father's intention must be contemporaneous with the purchase.

The presumption arising from the circumstances of the purchase of one estate cannot be qualified by transactions relative to other estates.

RICHARD FRANKLIN having three sons, Matthew (the eldest), John, and Richard, in 1779 purchased the reversion of a copyhold tenement holden of the manor of North Curry, in the county of Somerset, expectant on the death of Frances Wright; and, at a court baron on the *7th December, 1779, took the reversion of the said tenement, "To hold the same unto the said John Franklin, Matthew Franklin, and Richard Franklin, sons of the said Richard Franklin the elder, for their lives and the life of every and either of them longest living, successively according to the custom of the said manor, immediately after the determination of an estate then subsisting on the said premises, for the life of Frances Wright;" and Richard Franklin the father, and John, Matthew, and Richard the son, were admitted tenants as in reversion. By the custom of the manor, (as alleged in the bill,) a tenant may, by licence in writing, entered in the Court rolls, demise a tenement holden of the manor, whether in possession or reversion, for a term of ninety-nine years. On 2nd April, 1781, a licence was given to Richard Franklin the elder, to demise the tenement in question, for any term of years, determinable on the deaths of his sons John, Matthew, and Richard; and by indenture bearing date 5th May, 1781, on the marriage of John Franklin and Betty Dare, Richard Franklin the elder demised the said tenement to Robert Ludwell, his executors, administrators, and assigns, for the term of ninety-nine years, (to commence from the death of Frances Wright,) if John, Matthew, and Richard the son, or any of them, should so long live; upon trust

[*14]

† *Stock v. McAvoy* (1872) L. R. 15 Eq. 55, 57, 42 L. J. Ch. 230, 27 L. T. 441.

MURLESS to permit the premises to be held and enjoyed by Richard
v. Franklin the elder, and after his decease by John Franklin for
FRANKLIN. his life, and after his decease by Betty Dare for her life, and after the death of the survivor of them, in trust for the children of John Franklin and Betty Dare, in such proportions as John Franklin should appoint, and in default of appointment equally ; and for default of such issue, in trust for the executors, administrators, and assigns of John Franklin.

The plaintiff, Betty Murless, was the only issue of John Franklin and Betty his wife. John Franklin having survived his wife, married again, and died during the life of Richard Franklin the elder, without having made any appointment.

[15]

By his will, dated 22nd October, 1791, duly executed and attested to pass freehold estates, Richard Franklin the elder devised and bequeathed to his sons Matthew and Richard, and to the widow of his son John, certain legacies and freehold and copyhold estates, (some of which were holden of the manor of North Curry, in the names of his sons Matthew, John, and Richard,) and shortly after died. Matthew Franklin and Richard Franklin the son, caused the following memorandum to be endorsed upon the probate copy of their father's will: "We hereby ratify and confirm the will of which the within is a probate copy, and the gifts, devises, and bequests therein contained, in all respects whatsoever, so far as we can or lawfully may. 16th April, 1793." Frances Wright, the tenant for life, having died in 1816, Matthew Franklin commenced an action of ejectment to recover possession of the premises.

The bill prayed that the indenture of the 5th May, 1781, so far as respects the demise of the said copyhold premises, may be established and confirmed, and the trusts thereof carried into execution, for the benefit of the plaintiffs, and that Matthew Franklin and Richard Franklin the younger may be declared to be trustees of the said premises for the plaintiffs, and to have no beneficial right or interest therein, but subject to the aforesaid indenture of settlement ; and that, in the mean time, Matthew Franklin may be restrained by injunction from proceeding in the said action of ejectment.

By his answer, Matthew Franklin denied any knowledge of the

licence to lease granted to Richard Franklin the elder, or of the settlement made by him, till some years after their respective dates, or any assent to the settlement. He also denied the existence of a custom to enable the tenant to grant the tenement, by virtue of a licence, so as to affect the interest of the nominees, being his children, unless the licence is obtained at the same court at which the purchase is made, and the copy of the Court-roll granted.

MURLESS
v.
FRANKLIN.

The usual injunction having been obtained, and the usual order nisi on the filing of the answer, *Sir Samuel Romilly* now shewed cause against dissolving the injunction, [and cited *Dyer v. Dyer*†.]

[16]

Mr. Hart and *Mr. Farrer* against the injunction [cited *Finch v. Finch*‡].

Sir Samuel Romilly, in reply. * * *

[17]

[The arguments of counsel sufficiently appear from the judgment.]

THE LORD CHANCELLOR :

Jan. 26.

It is settled that though, in general cases, if A. purchases with his own money, and the conveyance is taken in the name of B., an implied trust in favour of A. arises from the payment of the purchase-money ; yet that doctrine has exceptions. One exception is, that if a man purchases in the name of his son, and no act is done to manifest an intention that the son shall take as trustee, that intention will not be implied from the payment of the purchase-money by the father, but the purchase is *primâ facie* an advancement. If the title to this estate stood on the transaction in December, 1779, when the interest in the copyhold was purchased, John Franklin, not the eldest son, being first named, no doubt can be entertained after the doctrine settled in *Dyer v. Dyer*,§ and followed in all subsequent cases, that this would be a purchase for the benefit of the sons, to take *successivè*, unless there was a custom in the manor controlling that doctrine, or contemporaneous evidence of a different intention.

[18]

† 2 R. R. 14 (2 Cox, 92). ‡ 10 R. R. 12 (15 Ves. 43). § 2 R. R. 14.

MURLESS
FRANKLIN.

In this case, the estate being reversionary, possession affords no evidence till the death of the tenant for life, which happened not till 1816.

[19]

It is contended by the bill, that in this manor there is a custom that a person purchasing in the names of his sons may afterwards obtain a licence to demise the purchased estate ; and it is admitted, that in some manors a custom exists, that a father so purchasing may, at the time of the purchase, take a licence to demise, and that a licence to demise so taken is evidence of his intention to dispose of the property himself ; and in the argument reference has been made to the doctrine of Lord KENYON in *Swift v. Davis*,† that a demise under the licence will divest the legal estate. If so, the title to this property might be tried by ejectment ; but it is material to observe, that the defendant swears that no custom exists in this manor, giving such effect to a licence taken at a subsequent time ; and all the cases have gone strongly to this point, that the evidence of the intention of the father must apply to the time of the purchase : subsequent acts will not enable him to convert an advancement for his sons into a beneficial purchase for himself.

It is then insisted that the devise of other estates, taken in the names of his sons, is evidence that though in this instance the name of John precedes the others, it was equally the intention of the father to take a beneficial interest in this estate. I think, however, that it is impossible to qualify the effect of the original purchase of this estate, by transactions relative to other estates. The acts of Matthew and Richard, confirming the father's will, are evidence rather that without that confirmation the will was invalid, than that he had a right to make the devises which it contains.

It appears to me, that this case affords no evidence to reduce the legal effect of the grant, and repel the presumption, that the purchase was intended for the benefit of the sons.

[*20] It is then said that Matthew is concluded by his own acts and cannot be permitted in equity to disturb the settlement *made

† 8 East, 354 n. [This case is reported in a note to *Doe d. Burrough v. Reade*, 8 East, 353, for the purpose, perhaps even then superfluous, of strengthening the authority of *Dyer*

v. Dyer, 2 R. B. 14 (2 Cox, 92). *Doe v. Reade* was omitted from the Revised Reports as containing nothing for which authority is now required.—F. P.]

by his father on the marriage of John Franklin. The mere fact of that settlement, unless the defendant's conscience can be affected by acts done or permitted, will not impeach his title. It is difficult to maintain that, if the persons claiming as nominees in the grant have done nothing, and have been merely cognizant of the settlement, their non-interference would preclude them. But the evidence does not carry the case even to that extent. The defendant denies that he acquiesced in the settlement; and avers that he has taken the earliest opportunity to assert his title.

MURLESS
v.
FRANKLIN.

The injunction must be dissolved.

GITTINS v. STEELE.†

(1 Swanston, 24—30.)

1818.

Jan. 28.

ELDON, L.C.

[24]

The general personal estate exempted from the payment of a particular legacy.

In the event of the deficiency of a particular fund appropriated to the satisfaction of certain bequests, the Court, on the question of the exemption of the general personal estate, cannot advert to the fact of a sale of part of the testator's property subsequent to the will, by which the particular fund has become insufficient.

THE question in this cause arose on the will of Evan Evans, dated 22nd May, 1809, to the following effect:

“First, I do order and direct, that all my just debts, funeral expenses, and the charges of proving this my will, shall be paid and satisfied by my executors, hereinafter named; also, I give and bequeath the sum of 7,000*l.* unto and equally between all my cousins, (describing them); and I do hereby charge all my freehold and leasehold messuages or tenements, lands and hereditaments, with the payment of the said sum of 7,000*l.*” The testator then bequeathed to J. Osborn, J. Steele, and W. Spencer, upon certain trusts, two sums of 8,000*l.* and 2,000*l.* 3 per cent. stock, then standing in his name; and after giving various pecuniary legacies out of his residuary estate thereafter mentioned, he gave and devised to Osborn, Steele, and Spencer, their heirs, &c. all his freehold and leasehold messuages, lands,

[25]

† *Hodges v. Grant* (1867) L. R. 4 Eq. 140, 143, 36 L. J. Ch. 935.

GITTINS
v.
STEELE.

hereditaments, &c. upon trust to sell and dispose of them; and as to the monies arising by the sale, and the rents and profits, in trust to pay all his just debts and funeral expenses, the legacy or sum of 7,000*l.* and the expenses of the sale; and as to the residue, in trust as after mentioned; and proceeded in the following words: "All my monies and securities for money, stock in trade, and the residue of my personal estate and effects whatsoever and wheresoever, and of what nature or kind soever, (not before disposed of,)" I give, &c., to Osborn, Steele, and Spencer, their executors, &c., "upon trust to sell and dispose of the stock in trade, &c., and out of the money to arise from the sale, and the other monies and securities for money, to pay the legacies of 8,000*l.* stock and 2,000*l.* stock, and the several charitable donations and other legacies hereinbefore mentioned, (except the legacy of 7,000*l.*, which is to be considered as a charge on and paid out of the monies arising by sale of my said freehold and leasehold estates); and then as to, for, and concerning as well the residue of the monies arising by sale of my said freehold and leasehold estates, as the residue of the monies arising by sale of my said stock in trade and personal estate, and the residue of my other monies and securities for money, upon trust to place out *the same on Government or real security, during the lives of T. E., J. O., &c., and the survivor, in trust out of the dividends to pay certain weekly sums before bequeathed; and as to the then remainder of the dividends, interest, and produce of such residuary estate, in trust to pay the same unto and equally between the several persons who, by virtue of this my will, shall become entitled to any part or share of the several legacies or sums of 7,000*l.*, 8,000*l.* stock, and 2,000*l.* stock before mentioned; and from and after the several deceases of T. E., J. O., &c., as to, for, and concerning such residuary estate, and the unapplied dividends, interest, and produce thereof, in trust to pay, divide, and distribute the same unto and equally between the said several persons, who, by virtue of this my will, shall become entitled to any part or share of the said several legacies or sums of 7,000*l.*, 8,000*l.* stock, and 2,000*l.* stock." The testator appointed Osborn, Steele, and Spencer his executors.

[*26]

After making his will, the testator sold some freehold and leasehold estates, and died in May, 1811.

GITTINS
&
STEELE.

The bill prayed that the will might be established and the trusts executed.

By his report the Master stated that the money produced by the sale of the testator's freehold and leasehold estates was insufficient to satisfy the legacy of 7,000*l.*; and that the testator having charged that legacy on his freehold and leasehold estates, and excepted it in directing payment of legacies out of his personal estate, he had not allowed to the executors their payments on account of that legacy.

The cause having come on for farther directions, the VICE-CHANCELLOR, by an order, dated 12th May, 1817, declared that the legacy of 7,000*l.* was a charge upon the general estate of the testator, and the produce of his freehold *and leasehold estates; and ordered that the sum of 6,112*l.* 14*s.* 6*d.*, paid by the executors on account of the said legacy, should be allowed to them as a proper payment.

[*27]

Some of the residuary legatees having presented a petition of appeal from such part of the order as declared the legacy of 7,000*l.* a charge upon the general estate of the testator, praying that such legacy may be declared to be a charge upon the testator's freehold and leasehold estates only, the cause now came on to be argued.

Mr. Wetherell, and *Mr. Cross*, for the appellants :

The testator, after expressly charging the legacy of 7,000*l.* on his freehold and leasehold estates, expressly exempts the rest of his property. That clause is clear and decisive; nor is any passage in the will inconsistent with it, or indicative of an intention that the legacy should be payable out of the personal estate. The deficiency in the fund which the testator had provided for the payment of the legacy, was the consequence of his own act, the sale of freehold and leasehold estates. The cases of *Bootle v. Blundell*,† *Hancox v. Abbey*,‡ and *Burton v. Knowlton*,§ decide the question.

† 15 R. R. 93 (1 Mer. 193).

§ 3 R. R. 62 (3 Ves. 107).

‡ 8 R. R. 124 (11 Ves. 179).

GITTINS
v.
STEELE.

Mr. Bell, Mr. Owen, Mr. Horne, Mr. Trower, and Mr. Roupell, for different respondents :

[*28]

The only question in the cases cited is, what is sufficient indication of the testator's intention to exempt his personal estate from payment of debts and legacies? That is not the question in this case. This testator has distributed his estate into two funds ; one, consisting of freehold and leasehold estates, he constitutes the primary fund *for the payment of his debts, funeral expenses, and the legacy of 7,000*l.* ; the other, consisting of his personalty, with the exception of the leasehold estates, he constitutes the primary fund for the payment of all other legacies ; and then, contemplating a surplus of each fund, he consolidates those two residues, and disposes of the whole by a general residuary clause. His purpose in the division of the estate into two funds, was to appropriate each to the payment of certain charges, and in the event of a deficiency of either or both of the funds, to prevent contribution till after satisfaction of the charges specifically imposed on each ; but it could not be his intention to exempt the residue of one fund from supplying the deficiency of the other. No benefit was designed for the residuary legatees, till after payment of the specific and pecuniary legacies. Residue, *ex vi termini*, denotes what remains after satisfaction of debts and legacies.

THE LORD CHANCELLOR :

It seems to me impossible to support this decision ; and I feel the less regret in differing from a judgment which an experience of more than forty years has enabled me to appreciate, in a question on which all the great men who have presided in this Court have differed from each other.

The old law was, (I regret that it is not law still,) that the personal estate could not be exempted from the payment of debts and legacies without express words. That yielded to the doctrine of demonstration clear, and declaration plain, which is such, that in any particular case, no man knows how it will apply. We have now reached the sound rule, that for the purpose of collecting the intention, every part of the will must be considered. That rule was first established by the great

Judge whom we have just lost, the late Master of the Rolls, and was confirmed by myself in *Boote v. Blundell*.†

GITTINS
v.
SEELE.
[29]

The present question is, not whether the personal estate is to be exempted from payment of debts and legacies, but, regard being had to all the parts of the will, the bequest over, and the rules of law, whether a particular legacy, (whatever may be the case with other legacies, or with debts,) is payable only out of the freehold and leasehold estates, or whether it is also payable out of the general personal estate, the charge on the freehold and leasehold estates being designed as an additional security. From the payment of debts the personal estate can be exempted only by the substitution of a sufficient fund, and it continues subject to the claims of creditors in the event of a deficiency in the fund provided. But legatees and devisees, as volunteers, are not entitled to resort to any other than the particular fund which the testator, or the law, has assigned.

His Lordship then proceeded to comment minutely on the clauses of the will, and after remarking that the persons named as executors were those who in the character of trustees, in every clause of the will, whether with reference to freehold or personal estate, were to execute trusts; that the question must be decided on the same principle as if all the persons entitled to the residuary estate were strangers; and that the latter words of the will would, as latter words, control the former; concluded as follows.

Entertaining no doubt that the intention of the testator has been frustrated by a subsequent sale of a part of his estates, I am not authorized to advert to that fact as affecting the construction of the will. I am bound, as a Judge, to assume that the testator supposed that he should leave at his decease freehold and leasehold estates sufficient for the payment of the legacy of 7,000*l.*; and I protest against being understood to give my judgment on the ground of the subsequent sale. My duty is to apply the funds *which, at his death, are applicable, by the operation of the will to the payment of this legacy. If they are insufficient, the Court, whatever may be the hardship of the case, cannot supply other funds.

[*30]

† 15 R. R. 93.

GITTINS
v.
STEELE.

I am clearly of opinion that the general personal estate is not subject to the legacy of 7,000*l.* The order therefore must be varied, but I shall not give costs.

1818.
Jan. 28, 29.
—
ELDON, L.C.
[30]

EX PARTE FLINT.

IN THE MATTER OF G. AND S. ROBINSON, BANKRUPTS.
(1 Swanston, 30—34.)

A creditor cannot claim the benefit of the mutual credit clause under the bankruptcy of his debtor, where such claim is inconsistent with an agreement between himself and such debtor.

THE petition stated, that in the year 1815 the petitioner, on the security of goods deposited with him by George Robinson and Samuel Robinson, booksellers, accepted bills of exchange for their accommodation, and after payment of the acceptances and sale of the goods, a considerable balance remained due to him ; that in September or October, 1816, G. and S. Robinson applied to the petitioner to discount a bill of exchange dated 15th May, 1816, for 650*l.* payable six months after date ; and they, having endorsed the bill in their joint names, and deposited it with him, the petitioner advanced to them 39*l.*, and was guarantee for the payment by them of 15*l.*, and accepted a bill of exchange on their account for 116*l.*; that the bill for 650*l.* was dishonoured when due, the drawer, acceptor, and indorsers, having all become bankrupt or insolvent, and is still unpaid, and a sum of 880*l.* is due to the petitioner from G. and S. Robinson for money lent ; that in January, 1817, a commission of bankruptcy was issued against G. and S. Robinson ; and that the bill remaining in the hands of the petitioner, in April last an action of trover was brought against him by their assignees to recover it, when on the evidence of George Robinson, (who having obtained his certificate was examined, and stated *that the bill was left with the petitioner, not on the general account between the petitioner and the bankrupts, but to secure only the advance then made in money, and the bill of exchange for 116*l.*) a verdict passed in favour of the assignees for the sum of 495*l.*, being the amount of the bill, deducting 155*l.* The petition,

[*31]

insisting that such verdict ought not to bind the petitioner, and that he was in equity entitled to retain the bill against the assignees until he should be fully paid what was due to him on the balance of the account between him and the bankrupts, and to set off that balance against the amount of the bill, prayed, that the assignees might be restrained from any farther proceedings on the verdict, and that the petitioner might be at liberty to retain the bill of exchange for 650*l.*, towards security for the money due to him from the bankrupts' estate, and as an indemnity against the engagements which he was under for them.

Ex parte
FLINT.

By his affidavit filed against the petition, George Robinson stated that one Jackson the acceptor, having been declared bankrupt before the bill became due, Robinson applied to the petitioner for the bill, in order that an arrangement might be made with Jackson's nephew, when the petitioner declared that he had borrowed 300*l.* or 400*l.* on the bill, and could not release it before January; George Robinson farther stated that the bill was left with the petitioner, not on the general account between him and G. and S. Robinson, but only for the specific purpose of securing such advances as he should make on the security of the bill, (which in cash and by acceptance amounted to the sum of 155*l.* and no more,) and it was understood and agreed between George Robinson and the petitioner that in case he assisted G. and S. Robinson with a sum of 120*l.*, or thereabout, which they then required, the petitioner should receive the whole amount of the bill when due, and retain it in his hands until the month of January, 1817, when it would be wanted by G. and S. Robinson to pay certain promissory notes issued by them.

Sir Samuel Romilly, Mr. Bell, and Mr. Roupell, for the
petition :

[32]

The bankrupts being indebted to the petitioner, deposit this bill with him as a security for farther advances. After the satisfaction of that particular purpose, had no bankruptcy intervened, they might, we admit, have recovered the bill in an action at law; but the bankruptcy brings the case within the operation of the statute 5 Geo. II. c. 30, s. 28.† * * *

† See now 46 & 47 Vict. c. 52, s. 38.

Ex parte
FLINT.

Mr. Hart, for the assignees :

The question has been decided by a competent tribunal. On the subject of set off, the statute gives to the courts of law an equitable jurisdiction. There are not two species of set off, one at law, and one in equity. This is a case not of mutual credit, but of bailment of a chattel, subject to a lien on the part of the bailee, with an undertaking to return the chattel, on payment of the money to secure which it was deposited. * * *

[33] *Sir S. Romilly*, in reply. * * *

Jan. 29.

THE LORD CHANCELLOR :

[34]

* * It has long been settled, that the statute authorizes the bringing into mutual account a great variety of items, which could not be made the subject of set off ; a doctrine which seems founded on notions of natural equity, and has been carried as far as construction can well carry it. The Judge at *Nisi Prius*, and the Court afterwards, thought that the petitioner received this bill under a contract of such a nature, that it would be contrary to natural equity for him to make that use which he now seeks to make of it, and to avail himself of the statute. On reading the affidavit of the petitioner and of the bankrupt, (whether the latter brings forward the evidence which appeared at the trial is not material to the present purpose,) I am of opinion that the petitioner had no right to consider this bill as an item of mutual credit, to be brought into the account ; and that the use which he seeks to make of it is contrary to natural equity.

I shall therefore dismiss the petition ; and the petitioner having come here after a failure at law, I shall

Dismiss it with costs.

HAMMOND v. NEAME.

(1 Swanston, 35—38; S. C. 1 Wilson, 9.)

1818.

Jan. 29.

*Rolls Court.*PLUMER,
M. R.

[35]

Under a bequest of stock, in trust to pay the dividends to M. H. H., the niece of the testator, "for and towards the maintenance, education, and bringing up of all and every the child and children of the said M. H. H., until he, she, or they shall attain twenty-one," then to transfer the principal equally among the children, with a bequest over in default of such issue, to the nephews and nieces of the testator living at the death of M. H. H. : The dividends are payable to M. H. H., although she has no child, for in that event a life interest to her is implied.†

The costs of the Bank, paid out of the capital of a legacy, for the security of which they were made parties.

By his will, dated 4th January, 1812, Austin Neame bequeathed to Richard Gibbs, his executors, administrators, and assigns, the sum of 3,400*l.* 8 per cent. reduced annuities, upon trust, "to pay and apply the yearly interest and dividends thereof, as the same should become due and payable, into the hands of his the said testator's niece, and his the said R. Gibbs' daughter, Mary Hills Hammond, for and towards the maintenance, education, and bringing up of all and every the child and children of the said M. H. Hammond, until he, she, or they shall attain the age of twenty-one years, and when and so soon as he, she, or they shall have attained that age, then upon farther trust to pay, assign, and transfer the said sum of 3,400*l.* unto and equally among all and every the child and children of M. H. Hammond, equally to be divided between them, share and share alike, and to their several and respective executors, administrators, and assigns; and in default of such issue, upon trust to assign and transfer the said sum of 3,400*l.* unto all and every his the said testator's nephews and nieces, the children of his the said testator's brothers; that is to say, the children of his brother John Neame, and the children of his brother Thomas Neame the elder, living at the decease of M. H. Hammond, and the child or children of such one or more of them as should be dead, equally to be divided between them, share and share alike, and to their several and respective executors, administrators, and assigns: provided always, and he thereby declared, that the first half-year's interest on the said sum of

† *In re Springfield, Chamberlin v. Springfield*, '94, 3 Ch. 603.

HAMMOND 3,400*l.* which should become due next after his decease, should
 v. go, and he thereby bequeathed the same, unto his nephew and
 NEAME. residuary legatee Thomas Neame the younger, his executors,
 administrators, and assigns."

[36] The testator died on the 1st of December, 1818. The plaintiff, Mary Hills Hammond, not having any children, claimed to be entitled to the dividends accrued on the sum of 3,400*l.* stock since the decease of the testator, (except the first half-yearly dividend payable after his decease,) and also to such as shall accrue during her life, or till she shall have a child which shall attain twenty-one.

The bill prayed a declaration of the rights of M. H. Hammond, payment of past dividends, and transfer of the stock into the name of R. Gibbs, the trustee, on the trusts of the will.

Mr. Hart and *Mr. Roupell*, for the plaintiff. [Cited *Andrews v. Partington*,† and other cases.]

[37] *Mr. Wingfield*, for the nephews and nieces of the testator.
 * * *

Sir Arthur Pigott, *Mr. Fonblanque*, and *Mr. Boteler*, for formal parties.

Mr. Hart, in reply. * * *

THE MASTER OF THE ROLLS :

[*38] The stock is given to Gibbs as a mere trustee. If the children were intended to be the only *cestuis que trust*, it *seems needless to direct payment by the trustee to a third person. In terms this is an immediate bequest of the dividends to the testator's niece; and it occurs in a will containing many bequests to nephews and nieces, but none other for her. The words are express to pay the dividends into her hands. If the birth of children is necessary to entitle her to payment, the legacy is conditional; but the terms are absolute. The payment is to be made into her hands; the purpose of the payment is to enable her to provide for the maintenance of the children; from her

they are to derive it; by her it is to be apportioned and distributed. The children are no direct objects of bounty, but only the occasion of bounty to the niece. It is a gift to a parent who, as mother, is under no legal obligation to support her children.

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NEAME.

The testator, her uncle, must have known that she had no children. Had he intended that she should take nothing till the birth of children, would he not, providing for the event of her death without issue, have made a bequest of the accumulated dividends? He has expressly provided for that event, and bequeathed the principal only.

The bequest of the first half-year's dividend to the residuary legatee, affords a farther argument in support of the same conclusion. The intention certainly might be to secure to him those dividends, in both events of there being or not being children; but if the testator meant that he should continue to receive the dividends till the birth of children, he would then have been led to express that meaning.

I am of opinion, therefore, that the plaintiff M. H. Hammond is entitled to receive these dividends.

The costs of all parties, except the Bank, must be paid out of the general personal estate; the costs of the Bank, who are made parties for the security of the legacy, must be paid out of the capital of the legacy.

1818.
Feb. 10, 11,
12.

ELDON, L.C.

[43]

SIR MARK WOOD, BART., v. EDMUND GRIFFITH.

(1 Swanston, 43—58; S. C. 1 Wilson, 34.)

The specific performance of an award may be compelled in equity, on the principle that the award only ascertains the terms of a previous agreement between the parties: and although the illegality of the acts of which it directs the execution will afford a ground for refusing to decree the performance, the Court, considering an award as the decision of judges chosen by the parties, will not examine whether it is unreasonable.

An equitable interest under a contract of purchase may be the subject of sale; the subcontract converts the original vendee into a trustee of his equitable interest for his vendee, who acquires the same rights which he had to the benefits to be derived under the primary contract. Such subcontracts are not within the doctrine of champerty and maintenance.†

By articles of agreement, dated 15th November, 1797, Michael Hicks Beach, with the consent of other persons interested, agreed to sell to Edmund Griffith, for 23,000*l.*, an estate called the East Mark estate; and by an indorsement on the articles, Mr. Griffith declared that the purchase was made for the equal benefit of Sir Mark Wood and himself. In the same year possession was taken under the contract, and 5,000*l.* were paid by Sir Mark Wood, on account of the purchase-money: in 1799 a farther sum of 2,000*l.* was paid by him; and in 1800 a lease of the estate was executed by Sir Mark Wood and Griffith to George Webb Hall, for a term of twenty-one years, at a rent of 1,170*l.* On the 24th of January, 1806, Beach and the other vendors filed a bill in the Court of Exchequer against Sir Mark Wood, Griffith, and Hall, praying the specific performance of the contract for the purchase of the estate; and in that cause the Court directed the usual reference to the Deputy Remembrancer to inquire whether the plaintiffs could make a good title. Disputes having arisen between Sir Mark Wood and Griffith concerning the management of the estate, and their respective rights and interests therein, and various suits having been instituted by them against each other, on the 4th of July, 1806, by an *order made in a cause then depending between them in the Court of King's Bench, all matters in difference between the parties were referred to arbitration.

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† On this point see *James v. Kerr* (1889) 40 Ch. D. 449, 457, 58 L. J. Ch. 355.—O. A. S.

By his award, dated the 9th of March, 1809, the arbitrator, after declaring, among other things, that a sum of 1,250*l.* was due from Mr. Griffith to Sir Mark Wood, and directing payment thereof on the 15th of June next, unless it should have been previously paid, out of Griffith's share of "the purchase-money to arise by the sale of the said estate thereafter directed to be sold," proceeded in the following words:

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v.
GRIFFITH.

"I farther declare and award, that all the right, title, and interest of the said Sir Mark Wood and Edmund Griffith in the said East Mark estate ought to be forthwith sold, and that the said Sir Mark Wood and Edmund Griffith are to be equally interested in and liable to all benefit or loss which may ultimately arise or happen from such sale. And inasmuch as the said Michael Hicks Beach and Henrietta Maria his wife, Richard Messiter, and Joseph Pitt have, by their bill filed in the Court of Exchequer as hereinbefore mentioned, prayed that in default of immediate payment by the said Sir Mark Wood and Edmund Griffith of what should be found due to the said Richard Messiter and Joseph Pitt, for principal and interest on the residue of the said sum of 28,000*l.*, the said estate, or a competent part thereof, might be immediately sold under the decree of the said Court, to raise the amount of what should be found due: I do further award and direct, that the said Sir Mark Wood do, some time in the course of the first six days of Easter Term next, or so soon afterwards as the said Court shall think fit to hear the application, cause a motion to be made, praying the said Court to direct a sale of the said East Mark estate in one lot, by public auction, before the Deputy Remembrancer, at such time as the said Court shall think proper under the circumstances of the *case; but with liberty for the said Sir Mark Wood and Edmund Griffith respectively to bid for the same at such sale. And I direct the said Edmund Griffith to consent to such application; or, in case the said plaintiffs in the said suit shall in the mean time apply to the said Court to direct such sale, I award and direct the said Sir Mark Wood and Edmund Griffith respectively to consent thereto; and in either of the said cases, I direct them the said Sir Mark Wood and Edmund Griffith respectively to consent, that if he shall be declared the

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v.
GRIFFITH.

purchaser of the said premises at such sale, he will accept such title thereto as the said Michael Hicks Beach and Henrietta Maria, his wife, Richard Messiter, and Joseph Pitt, shall be able to make thereto; and that he shall pay his purchase-money and complete his purchase forthwith."

The arbitrator then directed the distribution of the purchase-money, in case the Court of Exchequer should order such sale, first in satisfaction of the sum due to the vendors, then of the advances made by Sir Mark Wood, and afterwards in equal moieties between Sir Mark Wood and Griffith, and continued as follows:

"But in case the said Court of Exchequer upon such application as aforesaid, shall not think fit to direct a sale of the said estate, then I direct that they the said Sir Mark Wood and Edmund Griffith shall, within fourteen days after the said Court shall have signified such its determination thereon, join in giving a proper authority in writing, for Messrs. Hoggart and Phillips of Broad-street, in the city of London, auctioneers, to sell all the estate, right, title, and interest of them the said Sir Mark Wood and Edmund Griffith to and in the said premises by public auction, within six months after such authority shall be given, at which sale they the said Sir Mark Wood and Edmund Griffith respectively are to be at liberty to be bidders: and the monies for which such estate, right, title, and interest to and in the said *premises shall be sold at such sale, shall, after payment of all incidental expenses, be applied in the same manner as is hereinbefore directed respecting the surplus of the purchase-money of the said estate, if sold under the directions of the Court of Exchequer, after satisfying the payments which the said Court shall direct to be made thereout as aforesaid. And in either of the cases aforesaid, I award and direct that they the said Sir Mark Wood and Edmund Griffith respectively do execute all proper and necessary conveyances of the said premises, and every part thereof, and of their respective rights and interests in and to the same, to the purchaser or purchasers thereof, and do all acts necessary to carry such sale into effect. But if in either of the cases aforesaid it shall appear, that the said Michael Hicks Beach, and Henrietta Maria his wife, Richard Messiter

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and Joseph Pitt, cannot make a good and sufficient title to the said premises, or any part thereof, or if for any other reason the said contract for the sale of the said estate, as between the said last-mentioned parties and the said Sir Mark Wood and Edmund Griffith, cannot be carried into execution, then, inasmuch as the said Michael Hicks Beach, and Henrietta Maria his wife, and their trustees, are not parties to this reference, it does not appear to me that I can make any specific award concerning the said East Mark estate : But I award and direct, that if upon the completion of any sale of the said estate, or of the interest of the said Sir Mark Wood and Edmund Griffith therein, as hereinbefore directed, or upon the vacating or rescinding the said purchase contract, for want of a good title, or otherwise as aforesaid, the said Sir Mark Wood shall not receive from the net produce of such sale, or from the said M. H. Beach, or the said trustees, or out of the said Court of Exchequer, or otherwise, the whole of the said sums of 5,000*l.*, and 2,000*l.*, so advanced by him as aforesaid, with such interest as aforesaid, then and in that case the said Edmund Griffith shall make good and pay to the said Sir Mark Wood one moiety of the deficiency of the said two *principal sums and interest ; and if in either of the said last-mentioned cases, the sum or sums to be received by the said Sir Mark Wood shall exceed the said sums of 5,000*l.*, and 2,000*l.*, and interest as aforesaid, then I award and direct that the said Edmund Griffith shall be entitled to one moiety of such excess, and the said Sir Mark Wood to the other part thereof."

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v.
GRIFFITH.

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Within the first six days of Easter Term after the date of the award, Sir Mark Wood accordingly, with the consent of Griffith, moved in the cause depending in the Exchequer, that a sale might be directed of the East Mark estate ; but the plaintiffs in the Exchequer opposing the motion, it was, on the 12th of February, 1811, refused.

Within fourteen days after the refusal of that application Sir Mark Wood gave written notice to Griffith of his readiness to join in authorizing a sale of all the estate, right, title, and interest of himself and Griffith in the East Mark estate, pursuant to the award, and tendered to Griffith for his signature, which he refused, an authority to the auctioneers for making such sale.

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The bill, filed by Sir Mark Wood, stating these facts, prayed that Griffith might be directed specifically to perform the award so far as relates to the sale of all the estate, right, title, and interest of the plaintiff and the defendant to and in the East Mark estate, and forthwith to sign the authority before set forth to enable the auctioneers to make such sale, or that it might be referred to the Master to settle a proper authority for that purpose, and that the defendant might be directed to sign the same when so settled; and that he might be directed to do all other necessary acts for perfecting such sale on his part, and that the monies to arise from such sale might be applied according to the directions of the award.

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The defendant, by his answer, insisted that he was not bound to execute an authority for the sale of the estate, it being uncertain whether the vendors could convey a good title; and the arbitrator having declared that in case of their inability so to do, it did not appear to him that he could make a specific award concerning the estate, and in the event of the rescinding that contract for want of a good title or otherwise, having given directions for the settlement of the business between the plaintiff and the defendant.

The answer farther represented, that in Trinity Term, 1811, the plaintiff, by means of a partial and unfair statement of the award, procured a writ of attachment against the defendant for an alleged contempt of Court in not giving an authority for the sale of the estate; when the defendant, having in his answer to the interrogatories exhibited to him, stated that it did not appear that the vendors could make a good title, he was reported not in contempt, and the writ of attachment was quashed: and the answer insisted on those proceedings as confirming the defendant's construction of the award.

The answer also stated, that the defendant had advanced large sums of money in the management and concerns of the estate, and that a compulsory sale with a defective title, as required by the plaintiff, would be attended with great detriment to him.

The decree made by the MASTER OF THE ROLLS on the 22nd of March, 1814, declared, that the defendant was bound to perform his part of the award, by joining with the plaintiff in the sale of

all the estate, right, title, and interest of the plaintiff and defendant to and in the East Mark estate; and ordered, that the defendant should join the plaintiff in signing an authority to Messrs. Hoggart and Phillips, to sell all such estate, right, title, and interest, pursuant to the award accordingly; and in case the parties differed *about the form of such authority, that it should be referred to the Master to settle the same; and that the plaintiff and defendant should duly sign such authority when so settled: and after such sale should have been made, that the plaintiff and the defendant should respectively execute all proper and necessary conveyances of their respective rights and interests in and to the East Mark estate to the purchaser or purchasers at such sale, and do all acts necessary to carry such sale into effect; and that the monies for which the said estate, right, title, and interest should be sold, after payment of all incidental expenses, should be paid and applied in such manner as is in the award directed.

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On the 23rd of May, 1815, an order was made by consent, for a reference to the Master to settle and approve a particular and conditions for the sale of all the estate, right, title, and interest of the plaintiff and defendant to and in the East Mark estate. On the 15th of September, 1815, the sale took place, and Mr. Farquhar became the purchaser at the price of 10,100*l.*; and by an order of the 22nd of January, 1816, it was referred to the Master to approve a proper conveyance. Before the sale the defendant presented a petition of appeal from the decree at the Rolls; and having been attached for refusing to execute the deed of conveyance approved by the Master, he was on the 11th of July, 1817, discharged, on executing the deed as an escrow, to be deposited in the Master's office, and abide the event of the appeal.

The appeal having been argued on a former day by *Sir Samuel Romilly*, *Mr. Leach*, and *Mr. Cooke*, for the plaintiff; and by *Mr. Hart*, and *Mr. Spranger*, for the defendant, the LORD CHANCELLOR now gave judgment.

THE LORD CHANCELLOR :

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This case presents four questions :

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1st. What is the meaning of the award? It is contended on the part of Sir Mark Wood, that the Court of Exchequer having refused his application made in obedience to the award, for an order for the sale of the estate, inasmuch as that attempt to dispose of the estate became ineffectual, the interest of himself and Griffith under the contract, must be put up to sale. On the other hand it is urged, that till, by the report confirmed, it appears that a good title can be made, it was not the meaning of the award that the equitable interest, which might be more, or less, or nothing, should be sold.

2nd. (A question to which I have given much consideration), supposing the meaning of the award ascertained, and considering an award being founded in an agreement to refer, as an agreement of the parties, of which the specific performance may be enforced, whether the award may not be in its nature so unreasonable, that a court of equity will lend no assistance to its execution? A doubt founded in this instance on the circumstance that, according to the plaintiff's construction, the arbitrator orders a sale before it is known that a good title can be made, and when the period during which the reference of inquiry into the title has been pending, must depreciate the property.

3rd. Whether the award can be carried into effect? It is insisted by Mr. Griffith, that, supposing the meaning of the award such as the plaintiff contends, it requires the parties to do acts which would amount to champerty or maintenance.

4th. Whether the question on the construction of the award has been already determined; the Court of King's *Bench having dismissed the application of Sir Mark Wood, for an attachment against Griffith, on the report of its officer that Griffith had not been guilty of a breach of the award?

On the decision of these questions depends the general question, Whether, under the circumstances, the decree of the MASTER OF THE ROLLS ought to be affirmed or reversed?

The decree declares, that the defendant is bound to perform his part of the award, by joining with the plaintiff in the sale of all their estate, right, title, and interest, to and in the East Mark estate. On that principle the decree proceeds; and the subsequent ordering part is calculated only to carry it into effect. The

circumstances of the case are these : In 1797 the vendors entered into a contract with Griffith and Wood, for the sale of the estate, at the price of 23,000*l.* ; in the same year possession was taken ; and the history of this case may, I think, amount to a demonstration that the Court acts with something like justice, when, as in later times, it insists that purchasers taking possession of the estate shall not retain the price. The purchase-money was not put into a neutral state between the parties, as perhaps in all cases of possession by the purchaser it ought to be ; but Sir Mark Wood payed on account of the joint contract, in 1797 5,000*l.*, and in 1799 2,000*l.*, and in 1800 he executed a lease, by which he incurred an obligation to maintain the lessee in the enjoyment of the estate, for no less a term than twenty-one years. In 1806 the vendors filed a bill in the Exchequer to compel performance of the contract ; and the defendants in that suit putting in question not the contract, but the title, the Court of Exchequer had only to refer it to the Remembrancer to inquire whether a good title could be made. It must be admitted that the case is not without difficulty ; for the reference was directed in 1807, and the Remembrancer has not yet resolved that single question. It appears *that previously to 1809 Griffith and Wood had unfortunately engaged with each other in various suits at law and in equity, all which were referred to the decision of the arbitrator, and decided by his award. The question on the appeal is, whether the MASTER OF THE ROLLS has rightly construed that award ?

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It is extremely clear that every award must be certain and final ; but it has, particularly in more modern times, been considered the duty of the Court, in construing an award, to find that it is certain and final ; and instead of leaning to a construction, which in effect would destroy nine-tenths of the awards made, if possible to put one consistent sense on all the terms. In considering the meaning of this award relative to the sale of the estate, it must be recollected that the business of the arbitrator was to settle the differences between Griffith and Wood ; and that the Court of Exchequer, or the vendors, plaintiffs in that Court, might not consent to the sale of the interest, such as it was, or that property so circumstanced might not meet with a buyer ;

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and that notwithstanding the direction to sell, the estate might thus remain unsold.

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The direction for the sale of the right, title, &c. is, according to its incontrovertible meaning, a direction that all the right, title, and interest in the estate (those words never having been before used in the award) should be forthwith sold. The arbitrator seems to have intended a sale not only of the right, title, and interest, but of the estate itself, if it could be brought to sale. The direction is express that Wood and Griffith shall consent to a sale, and shall, if either of them becomes the purchaser, accept such title as the plaintiffs in the Exchequer can make. Attending to the constant language and practice of this Court, where it is repeatedly held that a party has by his acts rendered it impossible for him to object to a title, and coupling that with this express direction, it cannot be doubted that if the *plaintiff or defendant bought the estate, they must take such title as could be made. The arbitrator though he could compel them to consent to the sale, yet could make no such effectual order on the vendors, who were not parties to the reference. He foresaw that they might choose to retain the estate, notwithstanding the objections to the title, rather than carry it to sale subject to the depreciation arising from those objections. Providing for the event of their withholding their consent, he says, that in case the Court of Exchequer should not think fit to direct a sale, Griffith and Wood shall give authority to sell, not the estate, but all the right, title, and interest. Here is no qualification, no direction that the sale shall depend on the Remembrancer's report that the title is good.

Then comes the clause on which so much difficulty has arisen —“ But if in either of the cases aforesaid it shall appear, that the said M. H. Beach, &c. cannot make a good title, &c. it does not appear to me that I can make any specific award concerning the said East Mark estate.”† It occurred to the arbitrator, that it might finally appear that a title could not be made to this estate, that the purchasers would not be obliged to take it, and that therefore in certain events which might happen he could not make a specific award respecting the estate itself. Does

† See the clause, *ante*, pp. 20, 21.

that render the award less final and certain with respect to Griffith and Wood? Being, as I say they were, the owners of the estate in equity, they had a right, subject to considerations of law to which I shall presently advert, to sell such right, title, and interest as they had. It is impossible on a fair exposition to contend, that the arbitrator meant by this clause to defeat all the prior clauses. In the construction of an award the Court is bound, so far as the terms will admit, to give to it such a meaning as shall render it conclusive; and not by the construction of *one part to defeat another. That is my opinion on the first point.

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GRIFFITH.

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It is said that this opinion clashes with the judgment of the Court of King's Bench; I think not; but were it otherwise, if upon investigation I become convinced that their judgment is wrong, I should violate my duty by adopting it in preference to that which I think right.

One difficulty which I confess I felt, I shall now state, together with the grounds on which I have at length overcome it. That a bill will lie for the specific performance of an award is clear, because the award supposes an agreement between the parties, and contains no more than the terms of that agreement ascertained by a third person; and then the bill calls only for a specific performance of an agreement in another shape: but the Court has always exercised the discretion of withholding its assistance for the performance of unreasonable agreements. I was much struck with the consideration of this as an agreement to sell an estate under the circumstances in which the arbitrator has directed a sale; the very fact that the title is in dispute in the Court of Exchequer, must throw a damp on the proceedings and depreciate the property.

No one will dispute this proposition, that if a man offers to sell an estate in fee simple, and it appears that he is unable to make a title to the fee simple, he cannot refuse to make a title to all that he has. The purchaser may insist on having his estate such as it is. The vendor cannot say that he will give nothing, because he is unable to give all that he has contracted to give. If a person possessed of a term for 100 years contracts to sell the fee, he cannot compel the purchaser to take, but the

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GRIFFITH.
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purchaser can compel him to convey, the term, and this Court will *arrange the equities between the parties. But the present agreement is to be regarded as an agreement embodied in an award; and the question is, what is the effect of an agreement coming into a court of equity in that shape: and that question must be considered with reference to the cases in which Courts have determined, that they will conform to the opinion of Judges chosen by the parties. If Judges so chosen erroneously decide a question of law, the Court will abide by that decision. Upon that principle I am of opinion that the objection of the unreasonableness of this award cannot be sustained.

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It is then contended that the performance of the award will involve the parties in the guilt of champerty and maintenance. It must be admitted, that neither this Court nor any other will enforce an agreement by which, if carried into execution, the parties would be compelled under the process of a court of justice, to do that which in the view of justice is criminal. In many of the proceedings relative to this award; on motions for rules for an attachment, and to discharge rules, &c., this objection might have been urged; but without advertng to that circumstance, let us now consider the foundation of the objection according to the settled practice of the Court. I have referred to a class of cases in which this Court has been in the habit of declaring, that a party who contracts for the purchase of an estate in fee simple, is entitled to what the vendor can give. It is extremely clear that an equitable interest under a contract of purchase may be the subject of sale. A *person claiming under that contract becomes in equity a trustee for the persons with whom he afterwards contracts; without entering into any covenants for that purpose, they are obliged to indemnify him from the consequence of all acts which he must execute for their benefit; and a court of equity not only allows, but actually compels, him to permit them to use his name, in all proceedings for obtaining the benefit of their contract. Assuming that the award directs the sale of the estate, right, title, &c. before the determination of the suit in the Exchequer, what is that but what happens every day? If Griffith and Wood, during the pendency of the suit in the Exchequer, sold the

estate to A. B., he would have a right in a court of equity, to insist, as purchaser of the estate, that they should convey to him the fee simple, or such title as they had. So insisting, he claims no more than they would be entitled to claim, if they had not sold their equitable interest; having sold, they become trustees of that equitable interest: their vendee acquires the same right which they had; that is, a right to call on the original vendors, indemnifying them against all costs and charges, for the use of their names to enable them to execute the subcontract, by which they have undertaken to transfer their benefits under the primary contract. If I were to suffer this doctrine to be shaken by any reference to the law of champerty or maintenance, I should violate the established habits of this Court, which has always given to parties entering into a subcontract, the benefit which the vendors derived from the primary contract.

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I think that the opinion of the Court of King's Bench was not against the contract; but if it were, it would be my duty as a Judge, with all respect to their authority, to express my own judgment. The opinion of that Court on an attachment, is in truth little more than the opinion of their officer. It is a consolation to me, that if I am wrong *in this case, my error may be corrected elsewhere; but I have taken great pains to be right.

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The decree must be affirmed.

On this day *Mr. Cooke* moved, on the part of the plaintiff, that the conveyance executed by the defendant, might be delivered out of the Master's office, to be executed by the plaintiff, and delivered to *Farquhar*, the purchaser.

March 14.
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THE LORD CHANCELLOR :

The suit originated in a bill filed by Sir Mark Wood, praying the specific performance of the award. The late MASTER OF THE ROLLS thought, that by their agreement so ascertained, the parties bound themselves to bring to sale their interest in the estate, the title to which had not yet been shewn to be good, and during the pendency of a suit in the Exchequer between

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them and the vendors, and of a reference in that suit to the officer of the Court to examine the title. He held that the parties had agreed, if the estate itself could not be sold, to a sale of their right, title, and interest; a species of property which must be carried to market surrounded by difficulties and embarrassments. The purchaser of their interest in the contract might certainly, if a good title could not be made, compel repayment from the original vendors of the sums advanced by Wood; and he would probably be considered as having a lien on the estate to that amount; but it might be found that those vendors had no interest in the estate, and in that case the purchaser would have only a personal demand against the individuals who received the money.

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I repeat that I proceeded to the confirmation of this judgment most unwillingly; because it occurred to me that it was next to impossible that such an interest could be *sold otherwise than to the loss and disadvantage of one, at least, of the persons who had entered into the contract. I took pains to persuade myself that the award had not the meaning imputed to it by the MASTER OF THE ROLLS; but being finally of opinion that such was its meaning, I could not refuse to decree the specific performance of the award, considered as an agreement between the parties. The objections of the defendant appeared to me untenable. I thought it impossible to maintain, that the Court, in enforcing the performance of an agreement embodied in an award, applies exactly the same principles as in the case of a common agreement between A. and B. Having submitted to a Judge chosen by themselves, the parties give to his acts an authority which the Court would not allow to their own. If the objection that the acts which the award directs amount to champerty or maintenance can be sustained, I am satisfied that this Court has almost daily decreed a violation of the law.

The order must be made, but I shall give no costs.

REDFEARN *v.* SOWERBY.

(1 Swanston, 84—85; S. C. 1 Wilson, 96.)

1818.
Feb. 12.

ELDON, L.C.

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The Court will not order the personal representative of a deceased solicitor to deliver the papers in the cause to another solicitor, without payment, or security for payment, of the solicitor's bill. It seems that the summary jurisdiction of the Court extends to the representatives of a solicitor.

THE solicitor of the plaintiff having died, and his widow and administratrix refusing to deliver to the new solicitor the papers relating to the cause, unless security was given for the payment of the costs incurred, a motion was made, that the administratrix might be ordered, in a fortnight after notice, to deliver to the solicitor of George Gibson, the assignee of the plaintiff under the Insolvent Debtor's Act, all deeds, papers, and writings, in her custody or power, relating to this cause, or to any other suit or business of the plaintiff. The assignee and his solicitor undertaking to return all such deeds, papers, and writings to the administratrix, or to abide the order of the Court.

Mr. Hart in support of the motion.

Mr. Joseph Martin for the administratrix.

THE LORD CHANCELLOR:

I recollect no instance of such a motion. If a party chooses that his solicitor shall not proceed, it would be vain for him to insist on taking the papers out of the solicitor's hands, till what is due to him has been paid. Here the disability arises by the act of God, and we are to consider the effect of that disability on the rights of the representative. You cannot take the papers from the administratrix without giving her security that her lien shall be discharged. The question is, Whether she is bound to facilitate the progress of the cause, unless that personal liability is satisfied, the proceedings being stayed, not by the default of any party, but by the act of God? I should regret to hold that I have no jurisdiction over the representatives of a solicitor, or

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REDFEARN v. SOWEBBY. that a suit in equity or an action is necessary; but I feel a difficulty in saying, that you can have the papers without discharging the lien.

Motion refused.

1818.
Feb. 17, 20.

BELL v. FREE.

(1 Swanston, 90—92; S. C. 1 Wilson, 51.)

Rolls Court.

A REPORT of this case, taken from 1 Wils. Ch. 51, will be found, *post*, p. 153.

1818.
Feb. 24.

BATTERSBEE v. FARRINGTON.

(1 Swanston, 106—114; S. C. 1 Wilson, 88.)

Rolls Court.
PLUMER,
M. R.

It seems that a recital of written ante-nuptial articles in a post-nuptial settlement is not evidence as against the settlor's creditors.†

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In this case, a question arose as to the validity of a post-nuptial settlement of real estate made for the benefit of the settlor's wife which recited certain ante-nuptial articles in writing for a settlement, and purported to be made in pursuance and performance of such articles. The settlor had died without attempting to question the settlement.

There was no allegation that the settlor was indebted at the date of the settlement, nor any suggestion of intention to defraud his creditors, but, on the other hand, there was no evidence of the alleged articles independently of the recital contained in the settlement.

The MASTER OF THE ROLLS held that the settlement was valid as a voluntary settlement independently of the articles, so it became unnecessary for him to decide the question whether the settlor's widow claiming under the settlement was a purchaser for valuable consideration.

THE MASTER OF THE ROLLS said:

* * The distinction, I apprehend, is, that against all persons claiming under the settlor the recital is conclusive; but it would be difficult to maintain, that a recital in a post-nuptial settlement of ante-nuptial articles, of the existence of which

† Cf. *Warden v. Jones* (1857) 9 De G. & J. 76, 27 L. J. Ch. 190.

there is no distinct proof, would be binding on creditors. Such a doctrine would give to every trader a power of excluding his creditors by a recital in a *deed to which they are not parties. In this instance there appears no motive for the recital if untrue; a recital in a deed executed before the party engaged in trade, when he was not indebted, and twenty years prior to his death. The trustees and executors knowing, as they must, the affairs of the testator, have not suggested that he was indebted at the time of the settlement, nor has any creditor attempted to impeach it. I am bound therefore to declare it valid.

BATTERSBEN
v.
FARRING-
TON.

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THE PRINCESS OF WALES v. THE EARL OF LIVERPOOL.

(1 Swanston, 114—127; S. C. 1 Wilson, 113.)

A report of this case, taken from 3 Swanston, 567, will be found in a later volume of the Revised Reports.]

1818.
March 7, 10,
17.

ELDON, L.C. *

DUNNAGE v. WHITE.†

(1 Swanston, 137—153; S. C. 1 Wilson, 67.)

A deed executed by the members of a family to determine their interests under the will and partial intestacy of an ancestor, not enforced, it appearing on the face of the deed that the parties did not understand their rights or the nature of the transaction, and that the heir surrendered an unimpeachable title without consideration, and evidence being given of his gross ignorance, habitual intoxication, liability to imposition, and want of professional advice; in the absence of direct proof of fraud or undue influence, and after an acquiescence of five years.

By his will, dated the 8th of March, 1802, David Lewis, after giving to his nephew, William Lewis, in fee, a freehold estate at Bourne End, devised to the defendants, White and Letts, and their heirs, a freehold estate in Bearbinder Lane, upon trust, to receive the rents and pay them to Jane Hill during her life; and, after her decease, to sell the estate and divide the purchase money in manner following: three sixth parts to be paid to his nephews, William Lewis, John Lewis, and William Perks, and one sixth part *to his niece, Mary Nell; the other two sixth

1818.
Feb. 8, 20, 28,
21.

Rolls Court.
PLUMER,
M.R.

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† Cf. *Wood v. Abrey*, p. 264 below.

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v.
WHITE.

parts to be invested in the public funds, for the benefit of his nieces, the plaintiff Elizabeth Dunnage the elder, and the defendant, Margaret Atwell,—the interest or dividends to be paid to them equally, during their lives, for their separate use; and after the decease of either of them who should leave any child or children, to be applied towards the maintenance of such child or children during their minorities; and upon all and every of them attaining the age of 21 years, the said stock to be transferred to them, or the survivors or survivor of them, in equal proportions. The testator then, after giving some legacies, devised and bequeathed the residue of his estate and effects to the trustees and executors thereafter named, upon trust, to sell and dispose of his household goods and stock in trade, and collect all debts due to him, and all monies belonging to him upon mortgage, &c. and to divide the same into six equal parts, and pay them in manner following; four equal sixth parts to his said nephews, William Lewis, John Lewis, and the defendant Perks, and his niece Mary Nell. The remaining two sixth parts to be invested in the public funds upon the same trusts, in favour of the plaintiff Elizabeth Dunnage the elder, and the defendant Margaret Atwell, during their lives, and, after their decease, of their children, as were before declared concerning two sixth parts of the money to arise from the sale of the freehold estate in Bearbinder Lane. The testator appointed White and Letts his executors.

In addition to the freehold estates mentioned in the will, the testator at the time of its execution, was in possession of some freehold and copyhold lands at Munden Dane End, of which he had paid the purchase money, but no conveyance had been made; and between the date of his will and his death, he purchased other freehold lands at Munden Dane End, and obtained a decree of foreclosure of some messuages in Spital Fields, which had been mortgaged to him in fee.

[139] The testator died 2nd February, 1809, unmarried, and without issue. His next of kin were his nephews and nieces, James Edward Lewis, William Lewis, if living, the plaintiff Elizabeth Dunnage, Mary Nell, and the defendants William Perks, and Margaret Atwell. He had only one brother, John Lewis, who died in his life-time leaving two sons, William Lewis the eldest, and James Edward Lewis. In May, 1796, William

Lewis, then unmarried, entered as a seaman into the navy, and in August following deserted from his ship on the Jamaica station, and had not since been heard of.† If he died without issue before the testator, his brother James Edward Lewis was the heir at law of the testator at the time of his death; and if, having survived the testator, he afterwards died without issue, James Edward Lewis thereupon became, as his heir at law, the heir at law of the testator. James Edward Lewis, and his mother Ann Lewis, were the only next of kin of William Lewis, in the event of his death unmarried and without issue.

DUNNAGE
v.
WHITE.

At the time of making his will the testator had not any nephew named John Lewis, (his only nephew of that name having died an infant upwards of 20 years ago,) and it was alleged by the bill, and admitted by the answers of all the defendants, that the name John Lewis was inserted in his will by mistake for the name James Edward Lewis.

White and Letts proved the will, and entered into the receipt of the rents of the testator's real estate, except the estate at Bourne End, of which possession was taken by James Edward Lewis.

By indenture dated 26th February, 1810, made between the plaintiffs Daniel Dunnage and Elizabeth his wife, of *the first part; the defendants John Atwell and Margaret his wife, of the second part; Mary Nell, of the third part; the defendant William Perks, of the fourth part; and James Edward Lewis, (described as the brother and heir at law, and also one of the next of kin of William Lewis, then supposed to be dead,) of the fifth part; reciting the will of David Lewis, and his subsequent purchase of the estate at Munden Dane End, and in consequence of his not afterwards republishing his will, the descent of those lands to his heir; and farther reciting that John Lewis died in the life of the testator, and that William Lewis, upwards of fifteen years ago, departed the kingdom, and was supposed to have been lost on board a vessel which foundered at sea, and that James Edward Lewis was his heir at law, and James Edward Lewis, Elizabeth Dunnage, Margaret Atwell, Mary Nell, and William Perks, were his only next of kin, and that in order

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† The bill alleged that he was supposed to have perished on board a vessel lost at sea.

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 v.
 WHITE.

to prevent disputes and litigations between the several parties thereto, respecting their shares and interests in the said testator's real and personal estates so by him given and devised, and also in the said testator's real estates so descended to his heir at law, it had been agreed that the whole of the testator's property should thenceforth, or when the same or any part thereof should become payable or distributable, be taken and held by the parties thereto, and by every person interested therein, in trust for them, or any of them, in such shares, and upon the trusts, &c., after mentioned concerning the same, and that the parties had accordingly agreed to enter into the covenants thereafter mentioned; it was witnessed, that in pursuance of the recited agreement, Daniel Dunnage for himself and his wife, John Atwell for himself and his wife, Mary Nell, William Perks, and James Edward Lewis, severally covenanted with the others, their heirs, executors, &c. that each of them respectively, their respective heirs, &c. and all persons interested in the premises as trustees or otherwise for the parties thereto, or any of them, should thenceforth and so soon as the same or any part thereof should become vested in, *or payable or distributable to or among, the parties thereto or any of them, or any or either of their heirs, &c. stand seised or possessed of all and singular the real and personal estate and property, by the said testator in his said will so given, devised, and bequeathed, and also of the pieces or parcels of land and hereditaments, which had so descended to the testator's heir at law, and the monies, rents, issues, dividends, and profits, arising and to arise therefrom, (subject to the interest of Jane Hill and her assigns, in the premises in Bearbinder Lane, for her life, under the will), for the uses, &c. after mentioned, (that is to say,) as to the premises at Bourne End, to the use of James Edward Lewis in fee: and as to one undivided fifth part of all other the testator's real and personal estates, thereinbefore respectively mentioned, as well those which passed by his will, as those which descended to his heir at law, to the use of, or in trust for, James Edward Lewis, his heirs, executors, administrators, and assigns, according to the respective natures and kinds thereof; and as to one other undivided fifth part, to the use of, and in trust for, Daniel Dunnage and Elizabeth his wife, their heirs, executors, &c.

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(*ut supra*), and as to one other undivided fifth part, to the use of, and in trust for, John Atwell and Margaret his wife, their heirs, executors, &c. and as to one other undivided fifth part, to the use of, or in trust for, Mary Nell, her heirs, executors, &c. and as to the remaining undivided fifth part, to the use of, and in trust for, William Perks, his heirs, executors, &c.

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WHITE.

James Edward Lewis died in July, 1815, having by his will, dated 29th March, 1815, given all his estate and effects to his wife, the defendant, Abigail Lewis, her heirs and assigns for ever, and appointed her sole executrix.

The bill prayed, that the will of David Lewis might be established and the trusts performed, that an account might be taken of his personal estate, and of the rents and profits of his real estate devised or descended; that the trusts of *the indenture of 26th February, 1810, might be carried into effect, and the rights of the plaintiffs and defendants in his real and personal estates ascertained and declared; that such parts of his personal estate as remained unsold might be sold, and that the monies to arise by such sale, together with such parts of his personal estate as remained in the hands of the executors undisposed of, might be divided among the plaintiffs and the other persons parties to the indenture of 26th February, 1810, or their representatives, in the manner and proportions therein mentioned, and that his real estates might be conveyed to the plaintiffs and the other persons parties to the said indenture, or to the heirs of such of them as were since deceased, in such manner and proportions as therein mentioned, or otherwise that the testator's real and personal estates might be conveyed and paid to, or secured for the benefit of, the plaintiffs and such other persons as should appear to be entitled thereto, in such shares, and in such manner, as the Court should direct.

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Abigail Lewis by her answer stated, that James Edward Lewis was a very ignorant man, and very much addicted to liquor, and that he was prevailed upon to execute the indenture of 26th February, 1810, by fraud and imposition, and was not when he executed the same, acquainted with his rights as a devisee and legatee under the will, and as the heir at law, of the testator, and of William Lewis, but was induced to believe that

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Dunnage and his wife, and Atwell and his wife, had absolute interests in the shares of the testator's residuary personal estate, and of the money to arise by the sale of the estate in Bearbinder Lane, and could dispose thereof, and that he executed the indenture under such belief; that he did not receive any consideration whatever for executing the indenture, and that he was not at any time during his life called upon by the plaintiffs to carry it into effect; and she submitted that the indenture *ought not to be carried into execution, and that James Edward Lewis was not bound thereby.

Several witnesses deposed that James Edward Lewis was in a low station of life, having been employed by different victuallers to carry out beer for their customers, and continuing in that employment to the year 1810; that he was very ignorant and illiterate, addicted to drinking to excess, and in the habit of almost daily intoxication; that he did not understand the nature of deeds and legal instruments, and was incompetent to judge of his legal rights without professional assistance; and that he might be easily imposed on and influenced in matters of business.

The solicitor who attested the indenture of 26th February, 1810, deposed that the plaintiff Dunnage had been his client on various occasions, during six years previous to that date, but that James Edward Lewis became known to him about the end of the year 1809, and had never been his client; that James Edward Lewis and Dunnage gave verbal instructions for preparing the deed; that previous to the execution, the draft, and afterwards the deed ingrossed, were read to James Edward Lewis, and the contents fully and truly explained to him; that he was fully acquainted with, and comprehended, the true extent and nature of his rights and interests as a devisee and legatee, under the will of David Lewis, and as the heir at law of David Lewis and of William Lewis, and the contents and operation of the deed; that he executed it of his own free will, and without any undue or other influence; that he was perfectly sober at the time, and afterwards expressed himself satisfied with it; but that it was not perused by him, or by any professional person, other than the deponent, on his behalf.

Sir Samuel Romilly, Mr. Bell, and Mr. Girdlestone, for the plaintiffs, Mr. G. Wilson, and Mr. Shadwell, for defendants in the same interest :

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* * The deed proceeds on the basis of a compromise of doubtful rights. On the face of the will James Edward Lewis takes nothing; the fact that the testator intended to describe him by the name John Lewis was uncertain; the death of William Lewis, (the heir at law of the testator,) much more his death without issue and without a will, (in which events only James Edward Lewis would succeed to his rights as the heir at law of the testator,) was uncertain; the rights of James Edward Lewis, therefore, whether as devisee and legatee, or as heir at law, were uncertain. The deed removes this uncertainty, and recognizes and establishes rights previously doubtful. That recognition is a valuable consideration, *Stapilton v. Stapilton*,† *Cann v. Cann*.‡

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The second foundation on which this deed rests, is family arrangement. A compromise by which the peace of families is secured, the Court will anxiously support, abstaining from a rigorous scrutiny into the terms of the bargain, and sanctioning its stipulations, though proceeding on suppositions of right not conformable to the fact. In a state of common ignorance and uncertainty, the interests of the parties are promoted by any arrangement which terminates doubt and dispute. *Stapilton v. Stapilton*. *Cann v. Cann*. * * *

Mr. Hart, and Mr. Parker, for the defendant Abigail Lewis. * * *

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[Their arguments are substantially stated and adopted by the MASTER OF THE ROLLS in the judgment, *post*.]

Mr. Phillimore for the executors.

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THE MASTER OF THE ROLLS :

Feb. 25.

In this case the first question is, whether the plaintiffs are entitled to have the deed of 26th February, 1810, carried into execution. The objections are, first, that the deed was voluntary,

† 1 Atk. 2.

‡ 1 P. Wms. 723.

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containing no consideration in favour of the principal party ; next that it was obtained by fraud, from a person in a state of imbecility.

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When the testator died in February, 1809, his nephew William Lewis, the eldest son of his brother John Lewis, had been long unheard of. In 1796 he left England as a sailor, and no intelligence having been since received of him, except two letters written recently after his departure, the family considered him dead. On the supposition of his death, whether he died before or after the testator, the real estate given to him descended to James Edward Lewis. But the distribution of the share bequeathed to William Lewis of the produce of the estate in Bearbinder Lane, and of the residuary estate, supposing him dead, varied with the time of his death. If he died in the testator's life, the next of kin of the testator would be entitled, and his own next of kin if he died after the testator's decease. It seems agreed on all sides that the name John Lewis was inserted in the will by mistake, and that the testator meant to denote James Edward Lewis, the son of one John Lewis, *and the brother of another, both deceased. Supposing that fact ascertained, the only doubt was at what period William Lewis died. Recollecting that the testator lived till 1809, and that William Lewis had not been heard of since 1796, having left the country under circumstances which gave an early date to his probable death, there seems little doubt that he died before the testator. At the testator's death Jane Hill, the devisee for life, was living, and she enjoyed during her life, the rents of the estate in Bearbinder Lane. Beside the estates devised, the testator had subsequently acquired real property, which could not pass by the will. On those estates the devisees in trust entered. James Edward Lewis, the undoubted heir at law of the testator, and of William Lewis, took possession of the Bourne End estate.

Such were the circumstances of the family at the time of the execution of the deed : some doubt existed on one point, namely, the precise period of William Lewis's death. The fact of his death could scarcely be considered doubtful : and the strong probability was, that he died in the life of the testator. On that

supposition the real estates descended to James Edward Lewis the heir of the testator; if William Lewis died after the testator, (unless he left children, or a will, of which there is no evidence,) they descended to James Edward Lewis as his heir; but to no other person except James Edward Lewis, did any benefit pass in either event. With respect to the personal estate, the time of the death was certainly material; whether the next of kin of the testator, or of William Lewis were entitled, depends on the fact of survivorship. It is a strange mistake in the deed to represent the parties to it as the next of kin of William Lewis, when it is clear that his sole next of kin were his mother and James Edward Lewis; and it must not be forgotten that that error is one of the *data* on which the transaction is founded. Under these circumstances the deed is executed. Of the incompetence of James Edward *Lewis there is no satisfactory evidence: the solicitor who attests the deed, proves that he was sober, and under no mental disability; and with regard to undue influence, the evidence is certainly not sufficient to impeach the deed: but as to his general description there is strong testimony, and all on one side; that he was dissolute, illiterate, addicted to intoxication; that he had recently passed from a low station into the possession of property to which he was not apparently destined; and that his course of life rendered him extremely subject to imposition. Such habits, though not constituting absolute incapacity, lay a ground for a strict examination, whether the instrument contains in itself evidence that advantage was taken of them.

The solicitor who drew the deed, says that he received the instructions from Dunnage and James Edward Lewis, but he has not said what those instructions were: he admits that he had been for six years the solicitor of Dunnage, that he had scarcely any previous knowledge of James Edward Lewis; and that no other professional person was employed on his behalf. In these circumstances James Edward Lewis executes this instrument. Is its nature such as to import that all the parties, and he among the rest, were cognizant of what they did, and understood their rights? There seems strong ground to believe that the solicitor who says he fully explained the deed, did not

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understand the rights of the parties. I will not suppose that he intentionally misrepresented them, but they are grossly mis-stated in the deed. First, as I have remarked, it mis-states the persons next of kin to William Lewis; next after a recital, in general faithful, of the will, and in particular a recital that the shares of Elizabeth Dunnage and Margaret Atwell were, after their deaths, to be held in trust for their children, it proceeds to make an absolute disposition of those shares, depriving the children of every right under the will; and then, having limited to James Edward Lewis the Bourne End estate specifically devised, it directs the *division of the remainder of the real estate into five parts, of which one only is to be his. Four-fifths of the real estates descended on him are thus surrendered to parties who never had a pretence of title to any portion of them. No doubt was suggested of the legitimacy of James Edward Lewis, or of his being heir of the testator, and William Lewis; yet this large proportion of the property is thus relinquished without an equivalent. The deed ought to have contained a description of the whole real estate of the testator. How does it appear that James Edward Lewis knew to what estates he was entitled? This deed specifies only a part. It is too plain that those by whom he was surrounded kept him in ignorance of the extent of the property which had devolved on him.

As to the personal estate, if the deed was designed to solve doubts and terminate disputes, it should have been executed by persons competent to protect James Edward Lewis: the covenant of these parties affords no protection against the claims of children or devisees of William Lewis. James Edward Lewis taking one-sixth under the description of John Lewis, and in the event of the death of William Lewis in the testator's life, taking, as one of the next of kin, one-fifth of his one-sixth, would in this least favourable event be entitled to precisely that share of the personalty which was limited to him by the deed, namely, one-fifth of the whole. His interest in the personalty, and the realty to be converted into personalty, could not be less than one-fifth. From the deed, therefore, he could gain nothing in any possible event; but by a sweeping clause he abandons, without equivalent, a probable share of the personalty, and an undisputed real estate.

It is then insisted that the deed may be supported as a family-arrangement, according to the doctrine of *Stapilton v. Stapilton* and *Cann v. Cann*. Undoubtedly parties entitled in different events may, while the uncertainty exists, each *taking his chance, effect a valid compromise. In *Stapilton v. Stapilton* the legitimacy of the eldest son was doubtful; that was a question proper to be so settled; and the settlement was a consideration which gave effect to the deed; but without inquiring whether this transaction was voluntary, (for it is beyond doubt that James Edward Lewis received no consideration,) is this a deed which the Court ought to execute? I am satisfied that James Edward Lewis never understood it. By this instrument he covenants that two-sixths of the personalty shall belong to Dunnage and Atwell and their wives; but under the will, their children had fixed interests in the event of survivorship. What power had the parents to dispose of the property in their own favour? It is true they are now willing to correct this error, but the instrument must be considered as it stood at the date; and the question is, was it then a right disposition of the property? Instead of ending litigation, this deed creates it: as soon as the children became of age they must be advised to assert the rights of which it sought to deprive them. It is clear that the parties knew not what they were doing.

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WHITE.

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Considering, therefore, the state of mind of this person, his circumstances, and the nature of the transaction, I am of opinion that this is not such a deed as the Court ought to execute.

Upon the remaining question, whether the suit can be sustained for other purposes, I think that there is sufficient to entitle the parties to an account of the real and personal estate of the testator, to be administered on the trusts of his will, as if the deed of 1810 had never been executed. Were I now absolutely to dismiss this bill, it would be necessary to file another, with the omission of the deed, in every respect similar.

The bill, so far as it prays an execution of the deed of February, 1810, must be

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Dismissed with costs.

[Another question which arose when this cause was heard on further consideration is reported in 1 Jac. & W. 583, and will be found in a later volume of the Revised Reports.—O. A. S.]

1818.

Feb. 14, 18.

Rolls Court.

PLUMER,

M.R.

[161]

GALLAND *v.* LEONARD.

(1 Swanston, 161—165 ; S. C. 1 Wilson, 129.)

The words “in case of the death,” construed to refer to death in **the** life of the tenant for life.†

Bequest of personal estate being in trust, to pay the interest to **M.** the testator's widow, during her life, and on her death “to pay and divide the trust-mones unto and equally between his daughters **H.** and **A.**, for their own use and benefit absolutely, and in case of the death of them **H.** and **A.**, or either of them, leaving a child or children living,” to apply the interest for the maintenance of the children till twenty-one, then to divide the trust-money among them, expressing that the testator's intention was, that the children of his daughters should be entitled to the same shares to which their mother would be entitled if then living, with an ultimate trust in case of the death of **H.** and **A.**, without leaving issue living at their respective death, or of all their children dying minors; on surviving the tenant for life, **H.** and **A.** become entitled to the absolute interest.

FRANCIS MELL, by his will dated the 14th March, 1810, gave to his wife, **Ann Mell**, the whole or such part of his household furniture, plate, linen, and china, as she chose, for her own use and benefit absolutely, an annuity of 60*l.* for her life, and a legacy of the like amount, and after giving to his daughter **Ann** the sum of 1,050*l.*, to be paid on her attaining the age of twenty-one years, with interest, he gave to **Robert Galland**, **John Leonard**, and **John Spicer**, all his personal estate, not before disposed of, upon trust, to convert it into money, and after payment thereof of all his debts, legacies, and testamentary expenses, “upon trust to place out the residue thereof, at interest upon real or Government securities, and continue the same out at interest during the term of the natural life of my said wife **Ann Mell**, except only the said sum of 1,050*l.* above given to my said daughter **Ann** on her attaining the age of twenty-one years, and the interest thereof to be paid to her half-yearly, and upon trust to pay to her my said wife the said annuity of 60*l.* a year for her life in manner aforesaid; and upon her death, then upon farther trust to pay and divide the said trust-mones unto and equally between my said two daughters **Hannah** and **Ann**, for their own use and benefit absolutely; and in case of the death

† *O'Mahoney v. Burdett* (1874) L. R. 7 H. L. 388; (see p. 406).

of them my said daughters, or of either of them, leaving a child or children living, then upon farther trust to continue the same trust-monies out at interest during the minority of such child or children, and in the meantime to apply a competent part of the interest *thereof towards their maintenance and education, and upon their severally attaining their respective ages of twenty-one years, then upon farther trust to pay and divide the same unto and equally among them if more than one, and if only one child, then the whole to such only child, my will and mind being that the child or children of each of my said daughters shall be respectively entitled to the same share his, her, or their mother would be entitled to if then living; and upon this ultimate trust, that in case of the death of my said two daughters without leaving issue living at their respective death, in the event also happening of all their children dying minors, then my mind and will is, and I hereby direct my said trustees to pay and divide the said trust-moneys unto and equally among all and every my nephews and nieces then living, share and share alike, for their own use and benefit absolutely."

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The testator died in May, 1810, leaving his widow and two daughters, (the elder married, and of age; the younger a minor, and unmarried,) and several nephews and nieces. After the death of the widow, in November, 1810, the suit was instituted by two of the trustees, against their co-trustee, the daughters of the testator, the two children of his married daughter, and his nephews and nieces, for ascertaining the rights of the parties; and the usual accounts having been directed at the hearing, the cause now came on for farther directions.

Mr. Horne for the plaintiffs.

Mr. Parker for the daughters of the testator.

Mr. Duckworth for the children of the married daughter, and the nephews and nieces of the testator.

THE MASTER OF THE ROLLS:

Feb. 18.

Under this will three distinct claims are made; first, the two

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daughters of the testator, on the death of the *widow, claim the residue absolutely; next, the children of Hannah the married daughter (here represented by the two now in existence) contend that the daughters take only a life interest, and that the residue devolves to them, after their mother's death, on attaining twenty-one; thirdly, the nephews and nieces of the testator insist on an ultimate title, in the event of the two daughters dying without leaving children who shall attain majority. The difficulty consists in reconciling the terms of different parts of the will, or deciding which part is to prevail. In one passage, the estate is given to the daughters absolutely: then follows a limitation to their children in the event of their attaining twenty-one: the concluding words, it is insisted by the nephews and nieces, confer on them an ultimate interest. Undoubtedly, if the successive clauses of a will are irreconcilable, the rule is to give effect to the last clause, on an idea that the testator may have altered his intent; but a difficulty occurs in applying that rule to this case, because the question here arises on one clause, applicable all to one fund, and scarcely admitting, therefore, the hypothesis of a variation of intent. Being unable, then, literally to comply with every word in the will, the Court must endeavour, offering as little violence as possible to individual parts, to give effect to the whole; and I am satisfied that the true construction is, to declare that, in the actual event, the two daughters are entitled to the absolute property.

The intention of the testator is expressed in the first part by terms too clear to admit of doubt. Having first ordered payment of interest to his wife during her life, he directs his trustees, on her death, to pay and divide the trust-moneys equally between his two daughters,—an unequivocal declaration that, on the death of the tenant for life, the fund was to be divided between the daughters; the fund, and not the interest. The construction that the interest only was given to the daughters, departs from the express terms of the bequest. The gift is of the trust-moneys for their own use and benefit absolutely; and the

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testator's *meaning in these words is ascertained by other parts of the will. No doubt can be entertained that the household furniture, when chosen by the wife, was hers without qualifi-

cation; but it is given by the same expressions which are applied to this fund. So, in the latter clause, the gift to the nephews and nieces is to their own use and benefit absolutely. In these passages the testator meant to dispose of the entire interest. I cannot but impute to the same words, in the third instance, that meaning which in the other two is clear and undisputed.

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He intended, therefore, to give the fund absolutely to his daughters; but then the difficulty arises to reconcile this gift with the subsequent disposition in favour of their children, and of his nephews and nieces. It must be supposed that the testator contemplated two events. He meant that if his daughters survived his widow, they should take the absolute interest; but that if they were not then living to enjoy his property, it should pass to their children, if they left any; or, if they died without children, to his nephews and nieces. That construction reconciles every part of the will, and makes it one continued disposition of the whole fund. The words evidently import contingency; for, varying the phraseology used in the bequest to his wife, he employs the terms "and in case of the death;" and it has been properly observed, that in other instances, when words importing contingency were applied to an inevitable event, as death, they have been understood to denote the occurrence of the event under particular circumstances, as death at a given period, in the life of the testator, or of the tenant for life. The introduction of that qualification required by the expression, reconciles and renders sensible the whole of this disposition; and, in adopting that construction, the Court is warranted by many authorities. [His Honour here referred to *Cambridge v. Rous*, 6 R. R. 199 (8 Ves. 12), and other cases there cited.]

In the disposition on the event of the death of the daughters, leaving a child or children, the testator changes the expression; and, in appropriate terms, first gives interest, the subject of gift to the daughters being capital only. The declaration of his intention that the children should take the same share to which their mother would have been entitled, "if then living," establishes the title of the daughters. It is clear, that at twenty-one the children are to take an absolute interest; it is equally clear,

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from this clause, that they are to take the same interest to which their mother would have been entitled if living; the mother, therefore, would have taken an absolute interest; and the construction under which the mother takes a life-interest only, and the children absolute interests, is inconsistent with this explicit declaration. The clause expressing the "ultimate trust" merely takes up the other branch of the contingency; and provision being already made for the death of the daughters leaving children, provides for their death without children.

On the general construction of the will, therefore, the whole fund is to be divided between the daughters, if living at the death of the tenant for life: and, in the actual event, the whole passing under the first clause, the subsequent clauses are inoperative.

The decree declared, that according to the true construction of the testator's will, the defendants, Hannah, the wife of Francis Rhodes, and Ann Mell, are absolutely entitled to the clear residue of the testator's personal estate equally between them.†

1818.
Feb. 25, 26.

Rolls Court.
PLUMER,
M.R.

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MORPHETT v. JONES.†

(1 Swanston, 172—184; S. C. 1 Wilson, 100.)

Specific performance of a parol agreement to grant a lease, decreed on the testimony of one witness, confirmed by circumstances, against the denial in the answer, after part-performance by delivery of possession.

THE bill, filed the 10th of April, 1815, stated, that in October, 1809, a treaty having been entered into between the defendant Jones, and Robert Morphett, the elder, the father of the plaintiff, in his behalf, Jones agreed to grant to the plaintiff, and Robert Morphett, the elder, in behalf of the plaintiff, agreed to accept, a lease of certain lands, afterwards described, for a term of twenty-one years, to commence from Old Michaelmas-day, 1809, at a rent of 400*l.* Jones, in part performance of the agreement, wrote and signed an authority in writing, to the effect following.

† Reg. Lib. A. 1817, fol. 510.

App. Ca. 467, 479, and by KAY, J.,

† Referred to by Lord SELBORNE,
L.C., *Muddison v. Alderson* (1883) 8

McManus v. Cooke (1887) 35 Ch. D.
681, 691, 697.

"LONDON, 7th October, 1809. To Robert Morphett, Esq. I hereby authorize you to enter the under-mentioned lands as tenant, on Wednesday the 11th instant, being Old Michaelmas-day.

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v.
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Scotney near Lydd	Brackenbury . . .	Looker.	
Goose	New Romney . .	James Chittenden .	Ditto.
Crooked Elms, Newchurch .	} John Chittenden .	Ditto.	[173]
Pilraggs Ditto . . .			
Crump Field, St. Mary's . .	Hoy	Ditto.	
Corner Field New-bridge . .	Jacob Wratten . .	Ditto."	

The bill farther stated, that the plaintiff, in pursuance of the agreement and the written authority given in part-performance thereof, entered into possession of the premises, as tenant to Jones, in October, 1809, and continued in possession of the whole until Old Michaelmas, 1810, paying the rent of 400*l.*, allowance being made thereout of such sums as the plaintiff was entitled to have allowed ; that in March, 1810, Jones being desirous to sell those parts of the lands which were situated in or near Newchurch, St. Mary's, and East Bridge, communicated his desire to the plaintiff, or his father, in his behalf, by a letter, a part of which, after referring to a pressing demand for money, was in the following words:—"The only way I have of meeting it is, by selling part of the land. I know of several persons who would become purchasers, but I wish to give you the first offer of the whole or any part you may choose. I shall be inclined to take of you a fair price, inclining to your advantage. The pieces are, the

	ACRES.	
Pilraggs	86	} 70 acres.
Crooked Elms	16	
Crump Field	8	
Corner Field	10	

You have certainly my promise of a lease, from which I should be ashamed to swerve ; but should you not purchase any part of the land, you see to what disadvantage I must sell it. I shall be happy to give you the accommodation in the Goose and Lydd

MORPHETT land, so as to make up the term that was to be granted on the whole, or to make a deduction that may appear fair between us ;
JONES. or, if it is more to your interest, I will execute the plan first intended, that of a lease on the whole."

[174] The bill also stated, that in consequence of that letter, several meetings took place between Jones and Robert Morphett, the elder, on the subject of the intended sale ; and it was at length finally agreed, that the plaintiff should give up the land in and near Newchurch, St. Mary's, and East Bridge, being the land specified in the letter ; and should continue tenant of the residue of the premises, being the land in and near New Romney and Lydd, (and in the letter called the Goose and Lydd land,) for the residue of the term of twenty-one years, to be granted by lease, at the reduced yearly rent of 150*l.*, to commence from Old Michaelmas-day, 1810 ; that after Jones had contracted for the sale of the land specified in the letter, he requested the plaintiff to give up eleven acres of the Goose land, retaining in lieu the Corner Field, (part of the land previously agreed to be given up for the purpose of sale,) and the plaintiff having complied with his request, surrendered all the land which he had agreed to surrender, (namely the Pilraggs, Crooked Elms, Crump Field, and eleven acres of the Goose land,) and continued in possession as tenant, at the reduced rent of 150*l.*, of the residue, consisting of the Corner Field, and the Goose and Lydd land (except eleven acres of the Goose land given up).

The bill then stated, that in November, 1810, Jones, being desirous of purchasing the plaintiff's interest in the last-mentioned lands, communicated his desire to the plaintiff's father, by a letter, dated 2nd November, 1810, in which, after referring to his having occasion for money to complete the purchase of some estates, he proceeded thus : " The only resource then left to me, is to dispose of such part of my property as I may deem less likely to increase in value, and surely the marsh land is considered in this state. It therefore remains for me to offer you a consideration for the term you have in it, and I trust such a one as you will think liberal ; for I wish to make no other than a
 [*175] handsome compensation, which I feel I am bound *to do, as well for the inconvenience of your son's leaving the land, as for

the numerous obligations I lie under to you. I am willing to allow you the rent of the present year, and up to Michaelmas, 1811, on condition of your giving me at that time possession of the land; and I also engage to continue it to you after that period, in case I do not sell it, or that Fenner does not join in the recovery, in which case I cannot make a title. I have suspended for the present the draft of the lease, until your decision is known. If it should not meet your approbation, you will find me not swerve from what I have ever appeared true to, my word. I must then sell under the greatest disadvantage, which you are well aware of. I am so well convinced of your liberality, and of your wish to serve me, that I think you will allow the compensation equal to the sacrifice."

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The bill farther stating that the plaintiff did not accede to this proposal, but continued in possession of the premises, and paid the rent to Michaelmas, 1814, on the faith of having a lease, expending large sums in repairs and improvements; and that on the 23rd of March, 1815, he received from Jones (who had contracted to sell the premises to the other defendant, John Pepper) a notice to quit at Michaelmas next; prayed that the agreements, so far as the former was not altered by the latter, might be performed, and that Jones might be decreed to execute to the plaintiff a lease, pursuant to the terms of the agreement; and that the defendant might be restrained from proceeding at law for the recovery of the premises, or conveying or contracting to convey them.

By his answer the defendant Jones admitted, that in or about September or October, 1809, he entered into a treaty with Robert Morphett, the elder, in behalf of the plaintiff, touching the granting a lease of the lands in the bill described as after mentioned, but not otherwise, (that is to *say,) that the plaintiff wishing to become the tenant of the premises, it was proposed and agreed generally between the defendant and Robert Morphett, the elder, on the part of the plaintiff, that the plaintiff should become such tenant, but nothing was said as to any lease or term of years for which he was to hold the same, except that in the course of the treaty, the defendant promised generally to grant to him a lease, but he denied that any duration, or the

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commencement, or termination, or the rent, of any lease, was ever settled and agreed upon, or even mentioned in any way between him and the plaintiff; and he denied that he ever agreed or promised to grant to the plaintiff a lease of the premises for a term of twenty-one years, or for any other period, or that the rent to be paid should be 400*l.* a year, but he said that it was originally agreed, that the plaintiff should become tenant, at a rent to be settled by a mutual friend, who having accordingly valued the land at 3*l.* per acre, thereby ascertained the rent to be 450*l.* Admitting the written authority to take possession dated 7th October, 1809, he said that it was for the purpose of putting the plaintiff in possession as tenant from year to year, without reference to any lease, or agreement for a lease. He also admitted the letter of April,† 1810, possession taken by the plaintiff, the transaction for surrendering part of the lands, and remaining tenant (from year to year as he insisted) of the rest, at a rent of 150*l.*, the subsequent exchange of part of the Goose land for the Corner Field, and payment of rent as alleged in the bill. He denied expenditure by the plaintiff on the premises, except in cleansing ditches, to which he was bound as tenant from year to year, and claimed the benefit of the Statute of Frauds.

[*177] Robert Morphett, the elder, deposed, that some time previous to Michaelmas, (old style,) 1809, he entered into a *treaty with the defendant Jones, for a lease to be granted by Jones to the plaintiff, of all the lands mentioned in the bill for the term of twenty-one years, at a rent to be fixed by one Martin; and that about Michaelmas, 1809, it was finally settled between Jones and the witness, that Jones should grant a lease to the plaintiff for the term of twenty-one years, to commence on the 10th of October, 1809, at the rent of 400*l.*, Jones having agreed to abate 57*l.* from the rent of 457*l.* previously fixed by Martin, which Jones as well as the witness thought too high; that the plaintiff took possession, and paid the rent of 400*l.* to the 10th of October, 1810; that about Michaelmas, 1810, the plaintiff, at the request of Jones, gave up the possession of the Crooked Elms, Pilraggs, and Crump Field, and eleven acres of the Goose land; and it was

† Sic: but see pp. 49, 53.—F. P.

agreed between Jones and the witness, that the plaintiff should pay a rent of 150*l.* for the remainder of the lands, during the remainder of the term of twenty-one years; that the plaintiff paid that rent to October, 1815, and that such payment was made under the contracts between Jones and the witness on the part of the plaintiff; that the plaintiff had expended about 100*l.* upon the lands now in his possession, with a view to their improvement, and in expectation that Jones would grant a lease for twenty-one years, and that the improvements, (which he specified) were not such as are usually made at the expense of a tenant from year to year, or as would be made by any tenant who did not expect to have a lease for twenty-one years at least.

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John Morris deposed, that on the 2nd of November, 1810, at the request of Robert Morphett the elder, he informed Jones that the plaintiff could not comply with the request contained in his letter of that date, for the delivery of the lands; to which Jones replied, that the plaintiff should have the lease; it would be better for the plaintiff, but worse for Jones; for that he must sell the land, and that he had told Mr. Morphett so in the letter.

The plaintiff gave in evidence the defendant's receipt for 400*l.* for a year's rent to Michaelmas, 1810, and subsequent receipts for the reduced rent of 150*l.* [178]

Mr. Bell, Mr. Roupel, and Mr. Sugden, for the plaintiff.

. . .

Mr. Hart and Mr. Joseph Martin, for the defendant. [180]

. . .

[The arguments of counsel turned chiefly upon the question whether taking possession was a sufficient act of part performance of an agreement for a lease.]

THE MASTER OF THE ROLLS :

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The first question is, whether, by any act of part performance, this case is exempted from the operation of the Statute of Frauds. In order to amount to part performance, an act must

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be unequivocally referrible to the agreement; and the ground on which courts of equity have allowed such acts to exclude the application of the statute, is fraud. A party who has permitted another to perform acts on the faith of an agreement, shall not insist that the agreement is bad, and that he is entitled to treat those acts as if it had never existed. That is the principle, but the acts must be referrible to the contract. Between landlord and tenant, when the tenant is in possession at the date of the agreement, and only continues in possession, it is properly observed that in many cases that continuance amounts to nothing; but admission into possession having unequivocal reference to contract, has always been considered an act of part performance. The acknowledged possession of a stranger in the land of another is *not explicable except on the supposition of an agreement, and has therefore constantly been received as evidence of an antecedent contract, and as sufficient to authorize an inquiry into the terms; the Court regarding what has been done as a consequence of contract or tenure. The fact of possession here is proved, and proved in writing, by the regular authority transmitted to Morphett the elder, to deliver possession to the plaintiff, and it is beyond doubt, that possession was taken under some agreement. The existence of a contract is indeed admitted by the defendant; and the single question is, what are its terms?

To a certain extent both parties are agreed; as to the fact of a contract, the quantity of land, the agency of Morphett the elder, repeated meetings relative to a treaty, and possession taken under some contract, either for a tenancy from year to year, or a future lease. The defendant alleges that the contract was not obligatory, the period for which the lease was to be granted not being specified; and that possession was taken on the understanding that the terms would be ascertained when the parties met. On the other hand it is said, and proved by Morphett the elder, who made the agreement, that it was not a mere promise of a lease, but included a specification what that lease was to be; to commence from Michaelmas-day, 1809, at a rent to be fixed by Martin, afterwards reduced by the parties to 400*l.*, and for a period of twenty-one years. Supposing this

representation correct, here are all the parts of a complete contract: the quantity of land, the parties, landlord and tenant, the rent, and the term; but it is said that this statement is denied by the defendant, and he certainly swears positively, that the term was never fixed. The question is, whether the testimony of Morphett the elder is sufficiently corroborated; it being clear that the testimony of one witness, supported by collateral circumstances, may prevail against the positive oath of a defendant. *I think that all that passed strongly confirms his statement of the case. The fact that the parties ascertained the quantum of rent is cogent presumptive evidence that they had ascertained the duration of the lease. In fixing a rent, the first question is, for what term is it payable, for one year or for many years? Under a promise of a lease it would be premature to fix the rent before the parties were agreed on the term. From the time when the rent was fixed to the year 1815, when notice to quit was given, nothing passed farther to ascertain the terms of the agreement; and the continual payment of rent during that interval is a circumstance most improbable, on the supposition that those terms were still unascertained.

It is said, that the written authority to take possession is an agreement in writing, and that the Court is not at liberty to resort to parol evidence of the terms. I cannot so consider that document. It is the consequence of an antecedent agreement, not the agreement itself; and it must not escape attention, that it coincides in time with the parol agreement proved. The next act is the letter of March, 1810, written five months after the contract, nothing having intervened to render the situation of the tenant more permanent. I cannot interpret that letter, as referring to a mere vague promise. Written in a style the reverse of imperative, expressly mentioning a lease, and evidently supposing in the tenant a title to a term; to me it seems the letter of a landlord, bound by an equitable contract. It is then argued, that the relinquishment by the plaintiff of a large portion of the land repels the supposition of a right; but the transaction consisted not only in the surrender of 70 acres, out of 150, but in the reduction of rent from 400*l.* to 150*l.* Is that no advantage to the tenant? Of 150 acres, which he held at a

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MORPHETT rent of 400*l.*, he retains 80 at a rent of 150*l.* That might be
 F. a fair inducement to relinquish his right to the rest. With
 JONES. respect *to the quantum of rent, the receipt is strong evidence
 [*184] that it was 400*l.*, not 450*l.*; no reason can be assigned for
 giving a receipt for a total of 400*l.* unless that sum was the
 rent. The letter of November, 1810, is evidence still stronger.
 After the lapse of near a twelvemonth, nothing having passed to
 render the tenancy more fixed, the defendant not only addresses
 to the plaintiff a request to relinquish possession of the land,
 but offers a considerable sum, two years' rent, as a satisfaction
 of some supposed right. It is said, that the defendant, being
 a man of strict honour, might desire to purchase a release from
 his promise; he might so: but in March, 1815, when the
 plaintiff had the same claim on his honour, he sold the estate,
 and gave him notice to quit. Had this obligation of honour,
 still remaining unsatisfied, lost in 1815 the authority which it
 possessed in 1810? At that time his urgent application had
 received a refusal well calculated to provoke the assertion of
 whatever right he possessed. The acquiescence of a disappointed
 man affords strong evidence of a contract. The testimony of
 Morphett is corroborated by the transaction which Morris
 proves; and on the whole, I think the circumstances abundantly
 sufficient to confirm the statement of the witness; and that the
 plaintiff has established a parol agreement in part performed.
 The first agreement being once fixed, such as equity will enforce,
 the second only reduces the quantity of land, and of rent, leaving
 the original good as to the residue.

Specific performance decreed with costs.

GITTINS v. STEELE.†

(1 Swanston, 199—200.)

1818.
March 3.

On refunding sums paid under an erroneous construction of a will, a legatee entitled to other funds making interest in the hands of the Court, is to be charged with interest; not a legatee who has no farther concern in the estate.

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In preparing the minutes of the decree on the appeal in this case, a question arose whether in refunding so much of the legacy of 7,000*l.* as had been paid out of the *personal estate, the legatees of that sum who were also residuary legatees, should be charged with interest.

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Mr. Bell, Mr. Owen, Mr. Horne, and Mr. Trower, for different parties, opposed the charge of interest:

The payment was made *bonâ fide*. Interest is never charged except on contract or breach of trust, not for mere delay of payment.‡

Mr. Wetherell, in support of the charge :

The parties who have been prejudiced, are entitled to an indemnity from those who have profited, by the erroneous payment; and the Court is enabled to satisfy their just claims, from the residuary fund in its possession, a portion of which is the property of the overpaid legatees.

THE LORD CHANCELLOR:

Where the fund out of which the legacy ought to have been paid is in the hands of the Court making interest, unquestionably interest is due. If a legacy has been erroneously paid to a legatee who has no farther property in the estate, in recalling that payment I apprehend that the rule of the Court is not to charge interest; but if the legatee is entitled to another fund making interest in the hands of the Court, justice must be done out of his share.

The order directed payment of interest at the rate of 4 per cent.||

† *Parker v. Morrell*, (1848) 2 Ph. 433, 17 L. J. Ch. 226, 230.

§ See *post*, *Bell v. Free*, p. 153.

|| Reg. Lib. A. 1817, fol. 1689.

‡ Reported, *ante*, p. 7.

remarked "That is wrong; it is grandchildren;" upon which the witness altered the words grand-nephews and nieces to grandchildren, and again read the will to the testator, who said "That will do;" that the witness afterwards recollecting that all the grandchildren were infants, suggested the propriety of appointing trustees; and at the testator's request drew the codicil, naming Haswell and himself for that purpose.

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Mr. Bell and *Mr. Mascal* for the plaintiffs; *Mr. Roupel* and *Mr. Harrison* for the other grandchildren; and *Mr. Dowdeswell* for the nieces:

* * The whole difficulty is removed by the transposition of the word "all," which, in its present situation, is without effect, the term grandchildren necessarily including all who correspond to that description. * * *

Mr. Agar for the heir-at-law:

The Court cannot insert or transpose words for the purpose of disinheriting the heir; and the ecclesiastical court has decided that the trustees are not executors.

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THE MASTER OF THE ROLLS:

This instrument presents ambiguity of every kind, uncertainty both in the subject and in the objects of the bequest; who are to take, and what is to be taken. The Court cannot insert or transpose words for the purpose of giving a meaning to instruments which have none. The bill must be dismissed.

It was then suggested that the trustees should receive costs as between solicitor and client.

THE MASTER OF THE ROLLS:

Where the Court finds both a will and a fund, it avails itself of the fund to relieve the difficulties created by the will; but here is no will; nothing that can affect the real estate. Were there a fund in the hands of the trustees, they would be entitled to the costs as proposed, but they are trustees of a nullity.

Bill dismissed, with costs as against the heir-at-law, personal representative and trustees.

GOLDSMID *v.* GOLDSMID.

(1 Swanston, 211—222.)

1818.

March 4, 9.

Rolls Court.

PLUMER,
M.R.

[211]

G. having by marriage articles covenanted that if he died in the life of his wife, his executors should within three months after his decease pay to her 3,000*l.*, and having by his will given all his property to his executors, in trust, after payment of his debts, at the expiration of three years from his decease, to divide it "in such ways, shares, and proportions as to them shall appear right," on his death during the life of his wife, the executors having died or renounced, his property is divisible according to the statute of distribution, and the widow's distributive share exceeding 3,000*l.* is a performance of the covenant in the marriage articles.

Distinction between satisfaction and performance.

[In this case, which resembled and followed the leading case of *Garthshore v. Chalie*, 7 R. R. 311 (10 Ves. 1), it is thought sufficient to retain the following passages from the judgment of PLUMER, M.R., to which reference is occasionally made.]

Sir T. PLUMER, M.R. said :

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* * These are not cases of an ordinary debt: during the life of the husband, there is no breach of the covenant, no debt: the covenant is to pay after his death; and the inquiry is, not whether the payment of the distributive share is satisfaction, but, a question perfectly distinct, whether it is performance. An important distinction exists between satisfaction and performance. Satisfaction supposes intention; it is something different from the subject of the contract, and substituted for it; and the question always arises, Was the thing done intended as a substitute for the thing covenanted? a question entirely of intent: but with reference to performance, the question is, Has that identical act which the party contracted to do been done? What sum was the widow to receive; and when? If she has received the sum stipulated, and at the time stipulated, namely, on the death of her husband, from his assets, the contract is performed. That is the principle of the cases of *Blandy v. Widmore*, and the rest of that class. * * *

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In *Garthshore v. Chalie*,† the whole doctrine was investigated

† 7 R. R. 311 (10 Ves. 1).

to its origin, and the principles on which it rests ascertained—
 principles such as I have stated. In cases of this description,
 construing the covenant with reference to the nature of it, and
 to that which alone gives to the widow any title, the contract of
 marriage, the question must always be, Is the covenant per-
 formed? * * *

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Considering, therefore, the question of performance of the
 contract, on what principle can it be contended that the share
 taken under a *quasi* intestacy is not a performance, which the
 same share taken under absolute intestacy indisputably is? In
 this case, as well as in the other, the widow takes *pleno jure*,
 herself being administratrix, and precisely the same sum.
 Every rule and principle established in the former cases applies
 equally when the widow, in that character, receives a proportion
 of the assets, by operation of law, exceeding the amount which
 she was entitled to receive under her marriage contract. To
 determine that this is not a performance of the contract, when
 in the case of absolute intestacy I should be bound to determine
 it to be performance, would be to proceed on those nice distinc-
 tions so strongly reprobated by Lord ELDON† and Lord HARD-
 WICKE;‡ and which, to adopt the expression of the latter, “would
 never stand with the reason of mankind.” In substance, the
 widow obtains all for which she contracted; and I am therefore
 bound to say that she is entitled to her distributive share,
 but not in addition to her provision under the marriage
 contract.

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I desire to be understood as not intending to impeach the
 authority of *Haynes v. Mico*,§ and *Devese v. Pontet*||—I say only,
 that those cases are not applicable to the present. They were
 cases of testacy, and the question arose on the effect of legacies
 given by the will to the widow, which *prima facie* importing
 bounty, admitted a presumption of an intention in the testator
 to augment the provision in the settlement, and not to satisfy or
 perform it. No such considerations apply to intestacy.

“His Honor doth declare, That the personal property of
 Abraham Goldsmid in question in this cause ought to be distri-

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† 7 R. R. 318, 320.

‡ 3 Atk. 422.

§ 1 Br. C. C. 129.

|| 1 R. R. 15 (1 Cox, 188).

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buted as if he had died intestate; and the defendant, Martha Goldsmid, by her answer admitting that her distributive share of the said testator's personal estate and effects is larger than the sum of 3,000*l.*, by her said marriage articles covenanted to be paid to her by her said late husband in the event of her surviving him, His Honor doth order and decree, That the said defendant do take her distributive share of the personal estate of the said late Abraham Goldsmid; but the same is to be in satisfaction of the said covenant contained in the said articles made on the marriage of the said defendant with the said late Abraham Goldsmid, deceased."†

1818.
 March 17.

ELDON, L. C.

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THE MAYOR AND BURGESSES OF KING'S LYNN
 v. PEMBERTON.‡

(1 Swanston, 244—252.)

The insufficiency of funds for the completion of an undertaking, pending an application to Parliament for farther powers to levy money, is no ground for an injunction to restrain the promoters of the undertaking from commencing the contemplated works on their own land.

THE bill filed by the "Mayor and burgesses of the borough of Lenne Regis, commonly called King's Lynn, in the county of Norfolk, in behalf of themselves and all other the persons who are or may be interested in the security and preservation of the town and harbour of King's Lynn, and the navigation thence to the open sea," stated, that by Act of Parliament 35 Geo. III. c. 77, entitled, "An Act for improving the drainage of the middle and south levels, part of the great level of the fens called Bedford level, and the low lands adjoining or near to the said levels, as also the lands adjoining or near to the river Ouze, in the county of Norfolk, draining through the same to the sea, by the harbour of King's Lynn, in the said county, and for altering and improving the navigation of the said river Ouze, from or near a place called Eau Brink, in the parish of Wiggenhall St. Mary, in the said county, to the said harbour of King's Lynn,

† Reg. Lib. A. 1817, fol. 807.

‡ *Sharpley v. Louth and East Coast*

Railway Company (1876) 2 Ch. Div. 663.

and for improving and preserving the navigation of the several rivers communicating with the said river Ouze," certain persons therein described were appointed commissioners for drainage, and certain other persons commissioners for navigation ; and the commissioners for drainage were authorized and required to make a new river or cut, to branch out of the river Ouze at or near a place called Eau Brink, and to rejoin the present course of that river at or near the harbour of King's Lynn, for the free passage of the navigation, and of the waters of the river Ouze ; and in order that those purposes might be effectually answered, and that the harbour of King's Lynn might not be prejudiced or rendered unsafe in consequence of such *new river or cut, it was directed that the same should be made of the dimensions and on the plan therein particularly described ; and the commissioners of drainage were authorized and directed to execute all such works as certain engineers named should agree upon, for the better security and more effectual preservation of the town and harbour of King's Lynn, and the navigation thence to the open sea, from all possible damage in consequence of the making the said intended new river ; that after authorizing the sale of the bare sands and channel of the river between two dams which were to be constructed, the Act directed the commissioners for drainage to retain in their hands, out of the money to arise from the sale, a fund sufficient to answer the expenses of the future maintenance and repair of the works, which was to be exclusively appropriated to defray the expense of such maintenance and repairs as might become necessary, after the works should have been finished ; and that the Act authorized the commissioners for drainage to levy a tax of 4*d.* an acre on all the lands described, to be applied to the purposes mentioned ; and imposed certain tolls, during 10 years after the opening of the new river, on all goods passing thereon.

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The bill farther stated, that by statute 36 Geo. III. c. 33, the commissioners for drainage and navigation were authorized to direct the continuance of the rate of 4*d.* per acre during a farther period of five years ; that by statute 45 Geo. III. c. lxxii., the lands directed by the former Acts to be taxed at the rate of 4*d.* per acre, were taxed at that rate for five years from the

MAYOR, &c. 24th of June, 1805 ; and that by statute 56 Geo. III. c. xxxviii.,
OF it was enacted, that all occupiers of the lands taxed under the
KING'S LYNN former Acts should pay the sums with which they were chargeable,
v. together with a certain penalty thereon.
PEMBERTON.

[*246] The bill farther stated, that the tax of 4*d.* per acre for the term of 15 years, (which expired on the 24th of June, *1810,) if properly levied, would have produced the sum of 75,724*l.* and no more ; and that the arrears of the tax yet unreceived amounted to 20,000*l.* ; that none of the works proposed by the Acts had been commenced until lately, and that the commissioners for drainage had already expended 60,000*l.*, and upwards, being considerably more than the sum actually received by them on account of the said tax, in the purchase of lands and other purposes provided by the Acts preparatory to the commencement of the works ; and that they had no funds in hand for entering on and proceeding therewith ; but that on the contrary they were considerably in arrear in respect of the monies already expended by them, as appeared by a statement of their accounts from August, 1809, to the 25th of August, 1817, printed in behalf of the commissioners, and signed with the name of their treasurer, the defendant, a copy of which was annexed by way of schedule to the bill.

The bill then stated, that an application had lately been made, and was then pending in Parliament, in behalf of the commissioners for drainage, for an Act to enable them to levy a farther tax of one shilling per acre, for the term of five years, for the purpose of commencing and carrying on the works directed by the former Acts, and that such tax would amount to the like sum of 75,724*l.* and no more ; that by an estimate made in behalf of the commissioners for drainage, as a foundation for their application to Parliament, the expenses attending the making the said new navigable cut, and other expenses incident thereto, were stated to amount to the sum of 84,000*l.* ; in which estimate were not included the expenses of the several works which would become necessary for the security of the town and harbour of King's Lynn, and the navigation thence to the open sea ; that the nature and extent of such works could not be ascertained till the navigable cut had been completed, and the effect of the tidal

and other waters passing *through the same, and confined therein, was known; but that, in the opinion of engineers of skill, the completion of them would require 150,000*l.* or 200,000*l.*

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The bill farther stated, that the Mayor and burgesses of the borough of King's Lynn were incorporated by royal charter considerably above two centuries ago, and that they had ever since continued and still were a corporation by virtue thereof; and by letters patent granted to the predecessors of the plaintiffs, the then Mayor and burgesses of the borough, by King James I., the said Mayor and burgesses were constituted, and had ever since been and then were, admirals within the said borough, and the port, limits, and bounds thereof; and by virtue of such office and appointment, the plaintiffs and their predecessors for the time being had ever since and still exercised all necessary powers and authorities for the conservation and security of the said harbour, and of the navigation thereof; that previous to the passing of the Act 35 Geo. III. c. 77, certain able and experienced engineers, whom the plaintiffs consulted on that occasion, were of opinion that the opening of the said navigable cut would be attended with imminent hazard to the town and harbour of Lynn, and the navigation thereof, and that the hazard would probably increase with the increased operation of the waters of the said navigable cut, and the harbour be rendered inaccessible except to vessels of light burden; that the plaintiffs, together with the owners of other adjacent lands, opposed the passing of the Act, and obtained the introduction of the clause directing the construction of works for the more effectual preservation of the town and harbour; that the proposed tax of one shilling an acre for five years would not provide a fund sufficient for completing the navigable cut, and the works more immediately connected therewith; and that the proceedings in the works, so far only as the said fund would extend, would be attended with great and manifest detriment, and the most imminent danger, to the harbour *and the navigation thereof, as well as to the property and interests of the merchants of the town, and of a great number of the landholders of the adjoining districts; and that it would be necessary for the commissioners

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MAYOR, &c. of drainage to renew their application to Parliament for
OF an increase of the tax, or an extension of the period during
KING'S LYNN which it was to be levied, as often as the funds should be
9. exhausted, and inadequate to defray the current expenses of the
PEMBERTON. works.

The bill charged, that in proceeding to obtain the intended Act of Parliament, the commissioners were guilty of a fraud on the public, and especially on the plaintiffs, their application being grounded on a declaration and express understanding that the funds to be raised under the intended Act would be fully sufficient to complete all the works provided for by the several Acts; that since making the last-mentioned application to Parliament, the commissioners had begun to dig in the ground purchased by them for the purpose of making the said navigable cut, and that several hundred workmen were then employed upon the same under their direction; that the said works, if continued under the circumstances aforesaid, would be to the great and irreparable loss and injury of the town and harbour of Lynn, and of the navigation thereof.

The bill, farther charging that the defendant was many years ago duly appointed by the commissioners for drainage, and then was, the treasurer of the said commissioners; and that it was directed by the said Acts, or some or one of them, that the commissioners should and might be sued by or in the name of their treasurer for the time being, or other officer, as therein mentioned, prayed a discovery, and injunction to restrain the defendant as such treasurer, and the commissioners for drainage, their agents, &c., from making and digging, or continuing to make and dig, the said navigable cut, and from in any manner proceeding in the execution of the said several works, unless or until a *proper and sufficient fund should have been raised or provided, and set apart for the purpose of making and completing all such works as should be necessary for the security and preservation of the town and harbour of King's Lynn, and the navigation thence to the open sea, from all possible damage or injury in consequence of the making the said navigable cut.

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An affidavit having been filed, verifying the allegations of the

bill, and stating estimates to shew the insufficiency of the funds for the completion of the works, the plaintiffs gave notice of a motion for an injunction.

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Affidavits were filed in opposition to the motion, but not read. They stated, in substance, that with the strength of labour at present employed the works could not be finished, and the water diverted from its channel, within two years; nor could an additional strength be with safety employed for finishing them in less time; that the ground through which the work was then proceeding belonged to the commissioners of drainage, having been purchased by them for the purpose of making the cut; that until the ground at the ends of the cut was taken out, and the water of the river diverted from its present channel into the new river, no possible damage or injury could in any way happen to the town and harbour of King's Lynn, or to the navigation thence to the open sea; that the commissioners of drainage were in possession of about 14,000*l.* to proceed with the making of the new river; that the land and tolls which they would have as part of their fund would produce 40,000*l.*, and the tax to be levied under the intended Act 75,000*l.*

Sir Samuel Romilly, Mr. Bell, and Mr. Merivale, in support of the motion.

The commissioners have obtained the powers conferred on them by the Act, under a representation that the sums which they were authorized to raise would be sufficient to *complete the undertaking. That representation is falsified by the event. It is ascertained that their present fund is not adequate even to open the new navigable river, much less to construct the works necessary for the protection of the town and harbour of Lynn. Their application to Parliament proceeds on the acknowledgment of the insufficiency of their means. What may be the probable result of that application it is needless to inquire: for our purpose it is enough that they are not now in possession of competent funds. The question is, whether the Court will permit them, while they are destitute of the means of completing it, to proceed with an undertaking from the partial execution of which irreparable mischief may ensue.

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The circumstance of their not cutting through your lands distinguishes this case most materially from every other of the kind. In the case of *Agar and the Regent's Canal Company*,† I acted on the principle, that where persons assume to satisfy the Legislature that a certain sum is sufficient for the completion of a proposed undertaking, as a canal, and the event is that that sum is not nearly sufficient, if the owner of an estate through which the Legislature has given to the speculators a right to carry the canal, can shew that the persons so authorized are unable to complete their work, and is prompt in his application for relief grounded on that fact, this Court will not permit the farther prosecution of the undertaking. So in another case, a Mr. Taylor filed his bill, stating that at the time of subscribing, he expected that when he had paid the whole of his instalments he should find the canal complete, but that with the present fund it would not pass to the east of Hampstead, and the Court thought him entitled to relief.

[251] I do not say that you cannot reach this case: that is to be discussed; but it is not the case of a proprietor through whose lands the commissioners are proceeding to conduct the canal. I must assume that Parliament will not give to them farther powers, without taking care that they have funds sufficient to complete the undertaking. The proper application seems to be to Parliament, by petition representing these circumstances.

For the motion :

Our application is that, in the meantime, they may be restrained from proceeding with an undertaking which, in the eventual deficiency of the fund, may be productive of irreparable injury.

THE LORD CHANCELLOR :

What irreparable injury can ensue to the town and harbour of Lynn, from the act of the commissioners in cutting through their own lands? If they have not funds, and any proprietor

† 14 R. B. 217 (Coop. 77).

complains that they are cutting through his lands, that is an equity which I understand ; but unless irreparable mischief can be shewn to arise from the very act, what right have I to restrain them from cutting through their own lands ?

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Mr. Wetherell, and Mr. Abercromby, against the motion :

Before mischief can possibly arise to the harbour of Lynn, the canal must be completed. The object is to direct the river through that course, and we are still two miles from the harbour. The peculiarity of this case is that the undertaking must be completed before the alleged injury can occur.

THE LORD CHANCELLOR :

This case does not appear to me to turn on the same principle with those which have been mentioned. The commissioners are not cutting through the lands of others. *If the plaintiffs shew [*252] injury to their property, that is another ground.

Sir Samuel Romilly :

The ground of our application is danger to the harbour of Lynn. It is true that what is now done cannot injure the harbour ; but it occurred to us that if we delayed till the danger approached, suffering the defendants to expend large sums, the Court would tell us that we came too late.†

THE LORD CHANCELLOR :

You have come very properly ; but a peculiarity in this case is the pending application to Parliament ; and the Acts provide that the commissioners shall take measures for the security of the harbour of Lynn. Any person interested may petition either House of Parliament.

Motion refused.

† 1 Rail. Cas. 454.

1818.

*March 31.**Rolls Court.*PLUMER,
M.R.

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TODD v. GEE.

(1 Swanston, 255—262.)

On a bill by a purchaser for specific performance of a contract for the sale of an estate, a vendor who, during fifteen years, had retained possession of the whole estate, and of one-third of the purchase-money, was, under the circumstances, charged with interest on one-third of the rents and profits.

[THIS was a purchaser's suit for specific performance in which the Master had reported in favour of the vendor's title. The facts sufficiently appear from the judgment:]

[259] The cause coming on for farther directions, was argued by *Mr. Agar* and *Mr. Duckworth*, for the plaintiff; and by *Mr. Hart*, *Mr. Bell*, and *Mr. Barber*, for the defendants.

[The only material question was as to the settlement of accounts as between the vendor and purchaser.]

THE MASTER OF THE ROLLS :

[260] * * By the agreement in August, 1802, it was stipulated that the purchase money should be paid by instalments, one third on the 10th of October, 1802; one third on the 5th of January, 1803; and the remaining third on the 5th of April following, a good title to the estates being then made. The purchaser paid the first instalment, amounting to 5,333*l.* 6*s.* 8*d.* on the day appointed, the 10th of October, 1802; and the vendors have ever since retained that sum; and have also received all the rents and profits of the premises, Mr. Todd never having been admitted into possession of any part. An abstract was delivered in January or March, 1803, and was returned by Mr. Todd before the May following, with the objections of his counsel, the principal of which was, that the title could not be approved unless certain accounts were taken in a court of equity. The vendors insisted that the taking of those accounts was not necessary; and instituted a suit in May, 1804, to compel the purchaser to accept the estate without that preliminary. Their attempt failed; and Mr. Todd having subsequently filed the

second bill for the purpose of having the accounts taken, was resisted by the vendors, but ultimately succeeded. The vendors then having been uniformly wrong, while the purchaser was uniformly right, and having continued in possession of one-third of the purchase money, and in the receipt of all the rents and profits of the estate for upwards of 15 years, the question arises, Upon what principle the accounts are to be taken ?

The usual course is, that the purchaser shall receive the rents, and pay 4l. per cent. interest on the purchase money,—*a practice rather hard, where the delay is not caused by him; the rents seldom yielding 4l. per cent., and the purchaser, after having been deprived of the enjoyment of the estate, receiving it at last in a worse condition. In the present case, a delay of 15 years has been caused by the resistance of the vendors; and I think it is necessary to distinguish this case from those in which the Court has adopted the rule of giving to the purchaser the rents and profits of the estate, and to the vendor, interest on the purchase money. That rule was founded upon the principle recognized by courts of equity, that from the moment of the contract, although no purchase money is paid, the estate is to be considered as the property of the purchaser, and the purchase money the property of the vendor. But, in this case, the immediate payment of a part of the purchase money (no less a sum than 5,600*l.*) requires a deviation from the usual practice. The vendors have not only continued in possession of the rents and profits for the last 15 years, but, during that long period, have also enjoyed the benefit of this large portion of the purchase money, and instead, as in the common case, of now receiving the whole amount with simple interest in a gross sum, they have had the opportunity of making compound interest, on one third part, during a number of years sufficient to double the principal. If therefore, in this case, the common rule were adopted, the effect would be to give to the vendors, who from the issue of the suit stand as aggressors, a double advantage, and to subject the innocent purchaser to a double loss, namely, a loss of the benefit to be derived from an annual receipt of the rents, and of such profit as a continued use of his 5,600*l.* would have given to him, beyond the interest for which he would now have been

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accountable to the vendors. That rule would bestow on the wrong doer all the benefit of his own delay, and inflict all the evil on the rightful suitor.

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Under these circumstances equity demands that some *mode should be adopted by which the purchaser may be placed as nearly as possible in the same situation as if no part of the purchase money had been paid. The case is novel, and I am aware of no precedent, but on principle I think, that as in strict justice and conscientious dealing, a proportionate share of the estate should have been conveyed to him, in immediate exchange for his purchase money, the most equitable course in the power of the Court appears to be, in addition to the usual directions, to allow to the purchaser interest upon the rents and profits of so much of the estate as is proportionate in value to the purchase money already paid.

It may be said that Mr. Todd might have applied for an order that the 5,888*l.* 6*s.* 8*d.*, or the rents and profits, should be brought into Court and laid out; but he has not done so, and the vendors have enjoyed the benefit of his omission.

Under the circumstances, I am of opinion, that the vendors ought to account, not only for the rents and profits of the estate from October, 1802, but also for interest after the rate of 4*l.* per cent. upon one-third of the rents and profits. * * *



1818.
April 9, 13,
21, 23.
June 2.

Rolls Court.
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DILLON v. PARKER.

(1 Swanston, 359—409; S. C. 1 Wilson, 253; on appeal, Jacob, 505;
1 Cl. & F. 303.)

Construction of instruments as imposing an obligation to elect, and of acts as constituting election. The acts of a party bound to elect between two inconsistent rights, in order to constitute election, must imply a knowledge of the rights, and an intention to elect; possession being, under the circumstances, equivocal, as referrible to either right, the execution of deeds containing recitals of the character in which the party claimed, and the exercise of a power to dispose of the estates in that character amount to conclusive evidence of election.

SIR Henry John Parker, Bart., being seised in fee of the manor of Talton in Worcestershire, and of a house in Salisbury

Court, Fleet-street, and being possessed of a farm in the manor of Tredington, in Worcestershire, held under a lease for lives from the Bishop of Worcester, by indentures of lease and release dated the 1st and 2nd of October, 1741, in consideration of marriage (afterwards solemnised) with Catherine Page, his second wife, and of 5,000*l.* her portion, conveyed the estates before-mentioned, and all other lands or hereditaments in which he or any person in trust for him had any estate of inheritance or freehold, within the manor of Talton or Tredington, to John Page and William Trawell, their heirs and assigns, to the use of Sir Henry John Parker, *until the marriage, and after the solemnisation thereof, to the use of Sir Henry for his life; with remainder, as to the estates of inheritance, to trustees to preserve contingent remainders, remainder to the first and other sons of Sir Henry by his intended wife, in tail male, remainder to the use of Sir Henry in fee; and after the decease of the survivor of Sir Henry and his wife, as to the leasehold estate in the manor of Tredington, to the use of such son of Sir Henry by his intended wife as should be his heir for the time being, during the continuance of that estate, and of such life or lives then or thereafter in being, for which the leasehold premises were or should be granted; and in case such son should not, at the decease of the survivor of Sir Henry and his wife, have attained, or should not afterwards attain, the age of 21 years, then to the use of such son and heir of the body of Sir Henry by his intended wife, as should first attain that age during the continuance of the said estate, and of such life or lives as aforesaid; and in default of such son and heir in being at the decease of the survivor of Sir Henry and his intended wife, or then in *ventre sa mere*, and afterwards born alive, or in case every such son of Sir Henry by his intended wife, as should be living at the death of Sir Henry and his wife, or the survivor of them, or born after the decease of Sir Henry, should happen to die before any such son should attain the age of twenty-one years, then to the use of Sir Henry, his heirs and assigns, during the life or lives in being for which the premises then were or thereafter might be held and enjoyed.

The issue of the marriage were a son, John Parker, and two daughters, Catherine, (afterwards married to C. F. Garstin) and

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Margaret Sophia (afterwards married to John Strode), who all survived the death of their mother in 1750.

John Parker, on attaining the age of twenty-one, in the beginning of the year 1766, became, under a conveyance from Sir Henry John Parker, dated in October, 1753, tenant in fee simple of one moiety of certain estates situate at Hatch in the county of Wilts, and, under the will of John Page, his maternal grandfather, tenant in tail of the other moiety of those estates; he also became seised (in fee simple) of a messuage in Shorter's Court in the city of London, and of an estate tail in remainder in the estates comprised in the settlement of 1741, and entitled to considerable sums of money under the will of John Page, including a debt due to Page's estate from Sir Henry John Parker; and he soon afterwards levied fines and suffered recoveries of the estates devised to him by Page, limiting them to such uses as he should by deed or will appoint, and for default of appointment to himself for life, with remainder to his father Sir Henry John Parker in fee. By his will dated the 2nd of August, 1769, John Parker devised all his freehold and leasehold estates whatsoever that he was seised or possessed of, or was or should be entitled unto, in reversion, remainder, or expectancy, to his father Sir Henry John Parker and his assigns for his life; and after his decease he gave his estates in Shorter's Court, and the moiety of his estates at Hatch, and all other his real estates devised to him by the will of his late grandfather John Page, to Harry, afterwards Sir Harry, Parker, and Daniel Fox, in fee, upon certain trusts for the benefit of his sisters Catherine and Margaret Sophia, and their issue. He also devised, after the decease of his father, the manor and capital messuage called Talton, with the estate thereto belonging, the farms called Tredington, and Nolland's farm, in the parish of Tredington, and all other his manors and estates in Worcestershire and Warwickshire, his house in Salisbury Court, the other moiety of his estates at Hatch, and all other estates whatsoever which descended *or came, or which should descend or come, to him from his father, to his two sisters Margaret and Ann Parker (daughters of Sir Henry John Parker by his first wife) their heirs, executors, &c. for ever, as tenants in common. All the

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residue of his personal estate he gave to his father, and appointed him, if he survived, sole executor.

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After the date of his will, John Parker purchased a freehold estate at Arnscott, in the parish of Tredington, and by a codicil dated the 2nd of September, 1769, noticing his will, he devised that estate to his father Sir Henry in fee; and reciting that his father formerly executed a bond in the penal sum of 2,000*l.* conditioned for the payment of 1,000*l.* with interest to his late grandfather John Page, whereof the testator was entitled to one-third, and his sisters Catherine and Margaret Sophia to two-thirds, he declared that no part of the principal or interest due on the said bond, or on any other bond or security, should be paid by his father, but that the same and all other bonds and securities should be delivered up to him to be cancelled; and he enjoined his sisters to forbear any suit or prosecution of his father, on account of the said bond, or in any other respect, under pain of forfeiting all bequests in their favour.

John Parker died in September, 1769, unmarried and without issue, his father, and Margaret and Ann Parker, his sisters of the half blood, and Catherine Garstin and Margaret Sophia Strode, his sisters of the whole blood and co-heiresses at law, surviving.

Sir Henry John Parker, on the death of his son, proved his will, and possessed himself of his personal estate, and entered upon and enjoyed during his life the estates devised to him; and in May, 1770, mortgaged the Arnscott estate for 900*l.*

By his will dated the 10th of November, 1769, Sir Henry John Parker, after directing his debts to be paid, devised to Henry Parker and Daniel Fox, in fee, his manor of Talton, and his capital messuage or tenement, wherein he then dwelt, called Talton house, and all the farms and tenements thereunto belonging; and all other, his freehold manors, lands, and hereditaments in Worcestershire and Warwickshire; his freehold house in Salisbury Court; one undivided moiety of the manor lands and hereditaments situate at Hatch, or elsewhere in the county of Wilts, which descended to him as heir at law of the family of the Hydes; and all other his freehold estates, whatsoever and wheresoever, that he had power to dispose of; to the use of

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Parker and Fox, their executors, &c., for the term of one thousand years from his decease, upon the trusts thereafter declared ; with remainder, as to one undivided moiety of all the premises, to the use of his daughter Margaret Parker, for life, with limitations to her first and other sons successively in tail male, and as to the other moiety to the use of his daughter Ann Parker, with like limitations to her first and other sons, with various ulterior remainders, including a limitation to Sir William Parker for life, and to his first and other sons in tail male ; declaring it to be the meaning of his will, that the above mentioned estates should, after the decease of his daughters Margaret and Ann without issue male, constantly descend to the right heir male of the Parker family, in the manner he had above limited the same, as such heir male would inherit his title ; it being his intent that such his estates and title should descend and be enjoyed together as long as the laws of England would permit. He then devised to Henry Parker and Daniel Fox, all his leasehold estates in the parish of Tredington in the county of Worcester, and in the parish of Hampton in Arden in the county of Warwick, and all *other his leasehold estates, for all the estates, terms of years, and interests that he should have therein respectively at the time of his decease, subject to the rents and covenants in the several original lease or leases reserved and contained, upon trust to permit the same persons one after another respectively, to enjoy his leasehold premises, and to receive the rents and profits thereof, in the same manner as such persons would by his will be entitled to his freehold estates ; it being his intent that his leasehold, should be enjoyed with his freehold, estates, and remain to the same persons and to the same uses, as long as the laws of England would permit.

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The testator declared, that the term of one thousand years was limited to Parker and Fox, on trust from time to time, by sale or mortgage of the freehold and leasehold manors, messuages, &c., or with the rents and profits, or otherwise as they should think fit, to raise such sums of money as should from time to time be sufficient and necessary for payment of his just debts and legacies, or any part thereof, in case his personal estate should be insufficient for those purposes ; and also such

farther sums of money as should from time to time be sufficient and necessary to pay any fines for the renewal of any lease or leases, or putting in any life or lives in the place of such as might happen to drop in such leasehold premises, or any part thereof; and that all such new leases should be vested in Parker and Fox, or the survivor of them, his executors, &c., upon the same trusts as he had before declared, concerning the leasehold premises; and that in case the several sums of money above mentioned, should be paid as they were wanted, by the person or persons to whom the immediate reversion or remainder of the premises expectant on the term of one thousand years should for *the time being, belong under his will, then the said monies should not be raised by virtue of the term, but the said term should cease for the benefit of such person or persons.

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The testator then, after reciting that, by the will of John Page, late of Putney, Esq. deceased, several sums of money therein particularly mentioned, were given to his grandson, the testator's late son, John Parker, his executors or administrators, upon the contingencies in such will particularly expressed, declared that in case any sum or sums of money should become due and payable to, or vested in, the testator, (as executor of his said son,) or the testator's executors or administrators, by virtue of the said will, he bequeathed all such sum and sums of money, as he was, or might be entitled unto, or have a power of disposing of, unto Henry Parker and Daniel Fox, their executors, &c., upon trust, as soon as conveniently might be, after the said trust money should become vested in them, by virtue of his will, to invest the same in the purchase of freehold lands or hereditaments in the counties of Worcester or Warwick, which when purchased, should be conveyed to Henry Parker and Daniel Fox, or to some other proper trustees, and their heirs, upon the trusts and for the uses, &c., above declared, concerning his freehold estates. After farther reciting, that by virtue of the will and codicil of his said son John Parker, he might become entitled to certain devises and estates, by reason of certain forfeitures which would become vested in the testator, his heirs, executors and administrators, when such forfeitures should be incurred; the testator devised all the freehold and leasehold estates and

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hereditaments which he could or might be entitled to, by virtue of the will and codicil of his said son, or otherwise howsoever, to Henry Parker and Daniel Fox, their *heirs, executors, &c. upon the trusts, and for the uses, &c. before declared, concerning his freehold estates.

The testator, after some pecuniary legacies, bequeathed the residue of his personal estate, to his daughters Margaret and Ann Parker, and appointed them executrixes.

By a codicil dated the 18th of June, 1771, Sir Henry, in the event of the death of both his daughters Margaret and Ann Parker, without issue male, limited remainders to his daughters Margaret Sophia Strode, and Catherine Garstin, and their first and other sons in tail male, to take effect before the remainders limited by his will; and exempted his personal estate from the payment of his debts and legacies, "in order that it might go clear to his executrixes."

Sir Henry John Parker, died in October, 1771, leaving his daughters Margaret and Ann Parker, Margaret Sophia Strode, and Catherine Garstin, his co-heiresses. On his decease, Margaret and Ann Parker, proved his will, and entered into possession of the estates devised to them by their father and brother.

Margaret Parker died in May, 1785, unmarried, having by her will dated 1st May, 1780, devised to her sister Ann Parker in fee, her moiety of certain estates in the counties of Leicester and Northampton, inherited by her and her sister from their mother, her moiety of the Hatch and other estates in Wiltshire, devised to her sister and herself, by their brother John Parker, and all other her estates; and appointed her sister residuary legatee and executrix.

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On the death of Margaret, Ann Parker entered into *possession of the whole of the estates devised to her by her father, brother and sister. By her will dated the 1st of August, 1811, she devised among other estates, the dwelling house in Salisbury Court, to John Joseph Dillon, Esq., and his heirs, and the manor and mansion-house of Talton, the farm at Tredington, and her estates at Hatch, to Harry Parker, father of Sir William Parker, in fee, and appointed Sir William Parker executor of her

will, with a legacy of 500*l.*, bequeathing the residue of her personal property to John Joseph Dillon and his sister.

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Ann Parker died on the 26th of January, 1814, unmarried, leaving John Joseph Dillon her heir-at-law, and Sir William Parker proved her will. The devise to Harry Parker lapsed by his death, in the life of the testatrix.

The bill, filed by Mr. Dillon against Sir William Parker, stated, in addition to these facts, that Sir Henry John Parker, having become embarrassed, applied to his son, John Parker, for pecuniary assistance, proposing that his son should purchase his interest and reversion in the estates comprised in the settlement of 1741; that some agreement in writing was executed between them, for that purpose, in consideration of which, and of a conveyance of the estates to be made by Sir Henry, his son agreed to pay to him the sum of 700*l.*, and an annuity of 200*l.* during his life; that the sum of 700*l.* was accordingly paid, by means of which, Sir Henry was enabled to make an arrangement with his creditors; and that, in pursuance of that agreement, or some other to the like effect, John Parker entered into possession of all the lands described in the settlement, and occupied the mansion-house at Talton, which he fitted up at considerable expense, and paying or allowing all *the charges of housekeeping, resided there as the owner till his death; that he was also admitted into possession of the house in Salisbury Court, having expended 1,500*l.* in rebuilding it; and that he paid other sums for repairs and improvements of the settled estates.

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The bill prayed, a declaration, that Sir Henry John Parker, by accepting the benefits given to him by the will and codicil of John Parker, his son, elected and bound himself to conform thereto, in regard to the devises contained in the said will of the settled estates, and that the plaintiff was entitled to those estates; and that the defendant might be ordered to convey or release the same to the plaintiff, and deliver up all title deeds, &c. relating thereto, and might be restrained by injunction, from proceeding at law, concerning the estates in question.

The plaintiff also filed a supplemental bill, praying, that the defendant might elect to take under or against the will of Ann

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Parker ; and that the plaintiff might be quieted in the possession of the estates at Talton and Tredington ; and an account of the rents received and timber cut by the defendant.

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The answer stated, that the agreement between Sir Henry John Parker and his son, for conveying to the latter his father's interest in the settled estates, was subject to a proviso making it void in the event (which afterwards happened) of the death of the son in the life of his father ; that the defendant believed the articles of agreement had long been lost, and that Sir Henry John Parker always considered the will of his son as void, so far as it affected to devise the hereditaments in the county of Worcester and the house in Salisbury Court, and did not elect to take the benefits given to *him by that will in the manner in which they were thereby given ; admitted, that Sir Henry John Parker died indebted, and that his legacies exceeded the amount of his personal estate, and were discharged by means of a mortgage of the leasehold estates, the sum advanced on which Ann Parker afterwards paid, taking an assignment to herself ; insisted, that Margaret and Ann Parker, on the death of Sir Henry, took possession of the estates as his devisees, claiming under his will, and not under that of their brother, and in divers deeds and letters admitted that they claimed in that character ; and the defendant made title to the estates under the limitation in the will of Sir Henry John Parker. * * *

The articles of agreement executed between Sir Henry John Parker, and his son, were not produced ; the secondary evidence of their contents offered by the defendant, was rejected by the Court.

Mr. Hart, Mr. Bell, and Mr. G. Wilson, for the plaintiff :
* * *

Sir Sam. Romilly, Mr. Horne, and Mr. Shadwell, for the defendant. * * *

[The arguments of counsel, and the cases cited by them, sufficiently appear from the following judgment.]

June 2.

THE MASTER OF THE ROLLS :

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The claim of the plaintiff is confined to the estates originally

comprised in the settlement of October, 1741, and for the purpose of establishing his title, the bill begins with stating, as the origin of it, the deeds of that date, by which the estates were conveyed to the use of Sir Henry John Parker for life, with remainder to his first and other sons in tail male, remainder to himself in fee. Under that settlement, therefore, on the death of John Parker, the son, without issue, the estates became the absolute property of his father Sir Henry; the defendant claims as his devisee, and unless he had by some act deprived himself of the power of devise, the equitable estate would be, as the legal estate unquestionably is, effectually vested in the defendant. The plaintiff, however, undertakes to prove that, in the actual circumstances, the will of Sir Henry is invalid, and that the estates pass by the will of John Parker, the son. For that purpose, two propositions must be established, *first, affirmatively, that Sir Henry John Parker had relinquished his right of disposition over his own estates, by making his election to abandon them, on accepting the benefits given to him by the will of his son; next, negatively, that the daughters, to whom Sir Henry devised a life interest in the estates to which, under their brother's will, they were already entitled in fee, never made an election to abide by the will of their father, in opposition to that of their brother. It being clearly admitted, that during the joint lives of the father and the son, the settlement (unless altered by contract) was the rule between those two parties; the father having possession, and the right of possession during his life, with a remainder in fee, the son had no title to the immediate enjoyment of the estate, unless he acquired it by an agreement with his father. The plaintiff has endeavoured to establish that such an agreement was concluded, and that Sir Henry, who appears to have been in embarrassed circumstances, for a sum of 700*l.*, and an annuity, parted with his interest in the estate. It is in evidence that the son, after he attained the age of majority in 1766, actually occupied the house at Talton, expended considerable sums on the repairs of the house in Salisbury Court, and performed other acts which denote possession of the estate during the life of his father; payment of the sum of 700*l.* is not proved, and though both parties admit the

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existence of an agreement, neither has been able to produce it, or to offer to the Court satisfactory secondary evidence of its terms; one side representing it as an absolute surrender of his rights, by the father, the other, as qualified with a condition that the estate should revert to him in the event of his surviving his son. On this subject, the great lapse of time renders it impossible to ascertain the truth. I was of opinion, that the evidence tendered by the defendant, *of the existence, the loss, and the terms of the agreement, was not sufficient; the Court is, therefore, deprived of the light, which a knowledge of its contents would have afforded; but the plaintiff, who is bound to establish a clear case, certainly cannot assume, without proof, that his statement is correct. Unless by the agreement, Sir Henry surrendered his reversion in fee, it would not enable the son to make an absolute disposition of the estate. Without knowing, therefore, the particulars of that transaction, the Court finds, as the first instrument proved in the cause, the will of the son, dated the 2nd of August, 1769, followed by a codicil of the 2nd of September in the same year. By that will, John Parker, who had acquired considerable property as devisee and legatee of his grandfather Page, first devised to his father for life, all the estates of which he had power to dispose, and after a limitation in favour of his sisters of the whole blood, on which no question arises, he proceeds to give the Talton estates and other premises by name, concluding with a general description of a singular nature, "all his estates which had descended, or which should descend or come to him from his father;" an extraordinary reference, in an instrument executed during his father's life, to estates which had already descended from him; but the will was evidently prepared under a doubt, whether he should not survive his father; he provides for both events, nominating as his executor, his father if surviving, and substituting others in case of his death; and anticipating a descent which, in his apprehension, would render the devise valid, he gives the estates to his sisters of the half blood in fee. The plaintiff, as their heir claims by this devise. John Parker died in October, 1769, and under his will, supposing the settled estates to pass, (he seems to have imagined that he had power

to dispose of them, and it may therefore be *contended, that they are included in the first devise) Sir Henry became entitled to a life interest in those estates, (an interest which he had already), to a life interest in any other freehold estates of his son, and to the absolute interest in his personalty. By his codicil, the son devises to his father in fee, the Arnscott estate, acquired since the date of his will; and directs that his father's bond for the payment of 1,000*l.* should be cancelled, and that his sisters should forbear all suit against his father, under the penalty of forfeiting the benefits conferred on them by his will.

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In these circumstances it is insisted by the plaintiff, that, after the death of his son, Sir Henry ought to have been put to his election; that the son having assumed to dispose of an estate which belonged to his father, to whom he had given valuable property, it was not competent to the father at once to take the benefit of the will, and to defeat it. From the undisputed principle, that no one can frustrate an instrument under which he claims, Sir Henry might clearly have been put to his election; but the plaintiff maintains that he has actually elected. Supposing that election implies intention, a voluntary relinquishment by Sir Henry of the settled estates, an acceptance of the benefits given by the son at the price of renouncing his own property, and, as the term election seems to denote, a preference of one estate as matter of choice; is the fact of election so clearly established that the Court will be authorised in acting on that assumption? It seems difficult to prove all the circumstances necessary to constitute an election; that Sir Henry was apprised of the necessity of electing; that, knowing that he could not hold both the property to which he was previously entitled, and that which was given to him by his son, he voluntarily abandoned the former and took the latter. That he proved the *will of his son, and entered on the estates devised to him, is not sufficient. Did he not exercise dominion over his own estates as if the son had not devised them? Taking both estates, enjoying that which was his own, and also that given to him by his son, how can it be said that he relinquishes one and elects to take the other? Has he not rather elected to take both? It is clear that he thought the power of disposition

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which his son had assumed over his estates was in the actual circumstances inoperative; either that it was to take effect only in the event of the son's surviving, or that for some other reason he was not bound to submit to it; for in less than six weeks from the death of the son, in the next month after proving his will, on the 10th of November, 1769, he makes his own, containing a full disposition of his estates, long and elaborate limitations, settling them on his daughters Margaret and Ann for their lives, with successive remainders to their issue and other branches of the family, not considering himself bound by the devise which his son had made to the same daughters in fee. That was not relinquishing the estates, but, as far as choice was concerned, asserting a right to dispose of them, and an actual disposition; the same solicitor prepares, and the same witnesses attest, both wills; evidently no one conceiving that one instrument deprived Sir Henry of the power to make the other. With reference to intention, therefore, the evidence contained in these transactions, of his intention to retain his own estate, is at least as strong as the evidence of his intention to accept the property given to him by his son, derived from the mortgage and other acts of ownership exercised over it; how then can the Court declare that he elected to take one and renounce the other? The utmost that can be contended is that he has no right to enjoy both; that he was bound, and that the daughters might have compelled him, to make an election; *but they took no measure for that purpose; and in the short interval, about two years, which elapsed between the death of his son and his own, the acts of Sir Henry are equivocal, manifesting as much design to retain one estate as to accept the other.

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The point made by the plaintiff is, that acceptance binds, and operates forfeiture without reference to intent. It is said that Sir Henry accepting his son's gift, by that act renounced his own estate; that is not election, but forfeiture: if such is the effect of acceptance, even though in ignorance that it was not competent to the party to retain both benefits, but that on taking one, the consequence of law was that he renounced the other, then, by inadvertence without choice, an estate may be lost; but in all cases of election the Court is anxious, while it enforces the

rule of equity, that the party shall not avail himself of both his claims, still to secure to him the option of either; not to hold him concluded by equivocal acts performed perhaps in ignorance of the value of the funds; a principle strongly illustrated by the decision in *Wake v. Wake*.† The rule of the Court is not forfeiture but election; *utrum horum*. What acts will amount to election, what length of time, is matter of more doubt.‡ If I am to determine it as a question *of fact, I feel great difficulty in saying that Sir Henry ever meant, or even thought that he was bound to elect; *whether his acts would have concluded him, had his daughters insisted during his life that he had made his *election, is a very different inquiry; but it may be doubtful, whether on his death the daughters had any *farther right than that of requiring his representatives to make their election. On that point, the Court has intimated a disposition to hold, that if the representatives of those who were bound to elect, and who have accepted benefits under the instrument imposing the obligation of election, but without explicitly electing, can offer compensation and place the other party in the same situation as if those benefits had not been accepted, they may renounce them, and elect for themselves. If, therefore, immediately on his death it had been contended that Sir Henry had elected, and was bound to relinquish the settled estates, it would have been a question, whether his representatives might not have claimed a right to make their own election, rendering satisfaction for the benefits which he had enjoyed. This first part of the case is full of difficulty. The plaintiff, who desires the Court to deprive the defendant of his legal estate, is bound to establish an indisputable title; he must shew that the son possessed *power to devise the estate, or that Sir Henry elected to abide by his will; the bill is not framed for the purpose of putting Sir Henry's representatives to election, and the fact of election by him is negatived by his will made immediately after the death of his son. The argument which represents lapse of time and acts performed as conclusive, without regard to intent, is subject to great difficulties.

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† 3 Br. C. C. 255.

381—409, see *post*, pp. 87—95.—

‡ For Mr. Swanston's note, pp. O. A. S.

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These difficulties, the second point in the case renders it quite unnecessary to encounter ; for, assuming that Sir Henry made his election to abide by the will of his son, may not every argument which establishes that conclusion be applied with tenfold force to the conduct of the daughters after his decease ?

[His Honour reviewed the evidence upon this point at length and continued as follows:]

[394] On this evidence, I am of opinion, that the plaintiff has not established the second proposition on which his title depends, namely, that the daughters never elected to take under their father's will. I cannot pronounce the equitable right of the plaintiff, which, if it exists at all, existed in those ladies forty years ago, so clearly proved, as to authorise me to make the declaration prayed against the legal estate of the defendant. That legal estate has constantly remained with the title, which the plaintiff seeks to impeach, by establishing a disposition, the validity of which requires the supposition of facts, of which I find no sufficient evidence. So much of the bills, therefore, must be dismissed. With respect to the supplemental bill, which calls on the defendant to make his election of taking under or against the will of Mrs. Ann Parker, and, if he retains the house in Salisbury Court, to relinquish the legacy of 500*l.*, to that relief the plaintiff is entitled.

[Upon appeal by the plaintiff in 1822, (reported in Jacob, 505,) the LORD CHANCELLOR (Lord ELDON) affirmed the decision of the MASTER OF THE ROLLS upon the ground that the testator's daughters (under whom the plaintiff claimed) had elected to take under the will of their father, and that the plaintiff claiming through them was precluded from questioning such election.

On appeal by the plaintiff to the House of Lords (reported in 1 Clark & Finnelly, 808) the LORD CHANCELLOR's judgment was affirmed in 1838 on the motion of Lord LYNDBURST.

The following note by Mr. Swanston has been abbreviated by the omission of various passages and references which are

covered by later authority. It is discussed in *Douglas v. Douglas* (1871) L. R. 12 Eq. 617, 41 L. J. Ch. 74.—O. A. S.]

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A party bound to elect is entitled first to ascertain the value of the funds. * * And for that purpose may sustain a bill to have all necessary accounts taken, *Butricke v. Broadhurst*, 2 R. R. 100 (1 Ves. Jun. 171); *Pusey v. Desbouverie*, 3 P. Wms. 315. * * *

[381, n.]

What acts of acceptance or acquiescence constitute an implied election, must be decided rather by the circumstances of each case than by any general principle. The questions are, whether the parties acting or acquiescing were cognisant of their rights; whether they intended election; whether they can restore the individuals affected by their claim to the same situation as if the acts had never been performed: or whether, (on the principle *interest reipublicæ ut sit finis litium*,) these inquiries are precluded by lapse of time. * * *

[382, n.]

It seems that acts by which the party himself would not be bound, may bind his representatives; on the principle of "not disturbing things long acquiesced in by families, upon the foot of rights, which those in whose place they (the representatives) stand, never called in question," Confer. 2 Ves. Sen. 593, 525. If in satisfaction of previous claims, a benefit is given to a parent, and after his decease to his children, the children are not bound by the election of the parent; *Ward v. Baugh*, 4 R. R. 307 (4 Ves. 623), and see *Long v. Long*, 5 R. R. 101 (5 Ves. 445), and the reasoning of the Court in *Forrester v. Cotton*, Amb. 388, 1 Eden, 532. Under a covenant on marriage to purchase and settle lands worth 400*l.* a year, to the use of the covenantor for life, remainder to his wife for life, remainder to the heirs of their bodies, with election to the wife, if the husband died before a settlement, to take either the 400*l.* a-year, or 3,000*l.* in lieu of dower and thirds; the husband dying before a settlement, although the wife elected, to take the 3,000*l.* a settlement of 400*l.* per annum on her for life, with remainder to the children, was decreed against creditors. *Hancock v. Hancock*, 2 Vern. 605.

[*383, n.]

Election, on the part of an adult, may be compelled, by a

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direction, (in the decree on the original hearing,) that if he neglects or refuses to signify his election within a time limited (six months), he shall be understood as electing to assert his rights paramount to the instrument which imposes the obligation of election.

* * * * *

[384, n.] The doctrine of election originates in inconsistent or alternative donations ; a plurality of gifts, with intention, expressed or implied, that one shall be a substitute for the rest. In the judgment of tribunals, therefore, whose decision is regulated by that intention, the donee will be entitled, not to both benefits, but to the choice of either. The second gift *is designed to be effectual, only in the event of his declining the first ; and the substance of the gifts combined is an option.

[*395, n.]

If the individual to whom, by an instrument of donation, a benefit is offered, possesses a previous claim on the author of the instrument, and an intention appears that he shall not both receive the benefit and enforce the claim, the same principle of executing the purpose of the donor, requires the donee to elect between his original and his substituted rights ; the gift being designed as a satisfaction of the claim, he cannot accept the former without renouncing the latter.

A new modification of the doctrine arises on the occurrence of gifts of a peculiar nature. The owner of an estate having in an instrument of donation, applied to the property of another, expressions which, were that property his own, would amount to an effectual disposition of it to a third person, and having by the same instrument disposed of a portion of his estate in favour of the proprietor whose rights he assumed, is understood to impose on that proprietor the obligation of either relinquishing, (to the extent at least of indemnifying those whom, by defeating the intended disposition, he disappoints), the benefit conferred on him by the instrument, if he asserts his own inconsistent proprietary rights, or if he accepts that benefit, of completing the intended disposition by the conveyance in conformity to it of that portion of his property which it purports to affect. The foundation of the doctrine is still the intention of the author of the instrument ; an intention which extending to the whole dis-

position, is frustrated by the failure of any part; and its characteristic, in its application to these cases is, that by equitable arrangement effect is given to a donation of that which is not the property of the donor; a valid *gift, in terms absolute, being qualified by reference to a distinct clause, which though inoperative as a conveyance, affords authentic evidence of intention. The intention being assumed, the conscience of the donee is affected by the condition, (though destitute of legal validity,) not express but implied, annexed to the benefit proposed to him. To accept the benefit, while he declines the burthen, is to defraud the design of the donor.

The doctrine of election, in common with many other doctrines of our courts of equity, appears to be derived from the civil law. In that system, a bequest of property which the testator knew to belong to another was not void, but entitled the legatee to recover from his heir, either the subject of the bequest, or, if the owner was unwilling to part with it at a reasonable price, the pecuniary value. (Inst. lib. 2, tit. 20, s. 4, tit. 24, s. 1, Dig. lib. 30, l. 39, s. 7, l. 104, s. 2, l. 71, s. 3, lib. 32, l. 30, s. 6.) It was also competent to the testator, by express direction, (originally in the form of *fidei commissum*, at a later period in terms of gift, under the denomination of *legatum ab aliquo*) to impose the obligation of providing the bequest or its value, on any person deriving a benefit under his will. (Dig. lib. 32, l. 1, s. 6, l. 14, s. 2. Cod. lib. 6, tit. 37, l. 10, tit. 42, l. 9,) to the extent of that benefit. (Inst. lib. 2, tit. 24, s. 1, Dig. lib. 30, l. 114, s. 3.)

But a bequest, on the erroneous supposition that the subject belonged to the testator was, it seems, void; (Inst. lib. 2, tit. 20, s. 4. Dig. lib. 31, l. 67, s. 8,) unless the legatee stood in a certain degree of relation to the testator, (Cod. lib. 6, tit. 37, l. 10,) or the subject was the property of the heir. (Dig. lib. 31, l. 67, s. 8. Cod. lib. 6, tit. 42, l. 25.)

In every instance, the heir or legatee possessed the option of accepting or renouncing the inheritance or legacy thus burthened; but it seems that no medium was permitted between *these alternatives; no text has occurred recognising the right of the heir or legatee at once to accept the benefit offered by the will, and to retain the property of which it assumed to dispose,

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[*396, n.

[*397, n.]

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on the terms of compensation or indemnity to the disappointed claimant. The effect, therefore, of election to take in opposition to the will was forfeiture of the benefit offered by it. The effect of election to take under the will varied, as the property of which the will assumed to deprive the legatee was pecuniary, or specific; in the former case, he was compelled to perform the bequest to the extent of the principal and interest which he had received; in the latter, a peremptory obligation was imposed, to deliver the specific object, though exceeding the amount of the benefit conferred. (Dig. lib. 31, l. 70, s. 1.)

In the following decisions, the reader will recognise the doctrine of election, applied in circumstances constituting what in our courts of equity are technically denominated cases of satisfaction. *Cum pater pro filia sua, dotis nomine, centum promississet, deinde eidem centum eadem legasset, doli mali exceptione heres tutus erit, si et gener ex promissione, et puella ex testamento agere institueret; convenire enim inter eos oportet, ut alterutra actione contenti sint.* (Dig. lib. 30, l. 84, s. 6.)

Lucius Titius, cum duos filios heredes relinqueret, testamento, ita cavit; Quisquis mihi liberorum meorum heres erit, ejus fidei committo, ut si quis ex his sine liberis decedat, hereditatis meæ bessem, cum morietur, fratribus suis restituat; frater decedens fratrem suum ex dodrante fecit heredem; Quæro an fideicommisso satisfecerit? Marcellus respondit, id quod ex testamento Lucii Titii fratri testator debuisset, pro ea parte, qua alius heres extitisset, peti posse, nisi diversum sensisse eum probaretur: nam parvum inter hanc speciem interest, et cum alias creditor debitori suo extitit heres: sed plane audiendus erit coheres, si probare possit, ea mente testatorem heredem instituisse fratrem suum, ut contentus institutione fideicommisso abstinere deberet. (Dig. lib. 30, l. 123, pr.)

[398, *n.*]

By the civil law the doctrine of election seems to have been confined to wills, and in that application it originated in English jurisprudence. One of the earliest instances of interference by a court of equity to restrain the assertion of a legal claim, by reason of its inconsistency with the intention expressed or implied in an instrument conferring a benefit on the claimant, is

Lacy v. Anderson, in the reign of Elizabeth. "The suit is to stay a suit at law in a writ of dower made by the defendant, for that the defendant's wife had certain copyhold lands devised unto her in lieu of her thirds at law, which she accepted of and enjoyed twenty years, and yet seeketh now to recover dower of the freehold lands. The defendants demurred, because copyhold lands can be no bar of dower. But the Court thinks it no conscience she should have both; therefore ordered to answer. *Lacy et Uxor*, plaintiffs, *Anderson et Uxor*, defendants. An. 24 El." (Choice Cases in Chancery, p. 155, 156.) In an earlier case contained in the same collection, (*Rose v. Reynolds*, 28 & 24 Eliz. Choice Cases, 147, the Court assumed jurisdiction upon the principle that dower was barred in equity by acceptance of a benefit designed as a recompence, though not constituting a bar at law. * * *

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The foundation of the equitable doctrine of election, is the intention, explicit or presumed, of the author of the instrument to which it is applied and such is the import of the expressions by which it is described as proceeding, sometimes on a tacit, implied, or constructive condition, sometimes on equity. From this principle the whole doctrine, with its distinctions and exceptions, is deduced. * * *

[401, n.]

It seems, that mere recital of a supposed right in an individual named, will not amount to a gift of that right, or demonstration of an intention to give, so as to impose the obligation of election; *Dashwood v. Peyton*, 11 R. R. 145 (18 Ves. 27); but the expression of a condition with reference to one individual, is not sufficient proof that there was no intention to raise a case of election in favour of another.

[403, n.]

If a debtor, by his will, reciting the amount of the debt, directs payment of the sum at which he erroneously computes it, and also bequeaths a legacy to his creditor, the creditor may both claim the legacy, and dispute the calculation, the error in computation not denoting an intention to pay less than the actual debt. *Clark v. Guise*, 2 Ves. Sen. 617 [but see the cases noted at 11 R. R. 145].

An absolute power in the testator, to dispose of the subject, and an intention to exercise that power, seem in general sufficient

[404, n.]

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to raise a case of election; and therefore (notwithstanding the doubt intimated in *Rich v. Cockell*, 7 R. R. 227 (9 Ves. 369)), a devise to the heir, although inoperative (the heir, whether disputing or admitting the will, taking by descent), compels him to elect between the estate devised, and claims adverse to the will; *Noys v. Mordaunt*, 2 Vern. 581; *Gilb. Rep. in Eq.* 2; *Anon. Gilb. Rep. in Eq.* 15; *Welby v. Welby*, 13 R. R. 58 (2 Ves. & B. 187); *Thellusson v. Woodford*, 9 R. R. at p. 182 (13 Ves. 224). The estate descending to the heir under his election to claim against the will, descends subject to the implied condition.

In the instance of wills, and probably of deeds of donation, the effect of election to take in opposition to the instrument, is not absolute forfeiture of the benefit proposed, but an obligation to indemnify the disappointed claimants (see *post*, p. 101). Whether the same doctrine prevails in cases of express contract, is a question yet undecided, the decision of which must, it seems, depend on distinct principles (see 13 R. R. 277).

Election to take under a deed or will, imposes an obligation (to the extent at least of the benefit taken, 2 R. R. 265 (2 Ves. Jun. 372)), to give effect to the whole instrument, by the relinquishment of every inconsistent right. On this principle, in *Morris v. Burroughs*, 2 Atk. 627, some children of a freeman of London, electing to abide by the custom, and others by their father's will, Lord HARDWICKE declared, that the customary shares of the latter passed by the will. The title of the children to the orphan's portion, being paramount to the will, the condition of their claim under it, was (by the ordinary rule), that their property, of which it assumed to dispose, should be subjected to its disposition.

The rule of not claiming by one part of an instrument in contradiction to another, has exceptions, Lord HARDWICKE [*405, n.] *2 Ves. Sen. 33, and see Vern. & Scriv. 53; and the ground of exception seems to be, a particular intention, denoted by the instrument, different from that general intention, the presumption of which is the foundation of the doctrine of election. "Several cases have been, and several more may be, in which a man by his will, shall give a child or other person, a legacy or

portion in lieu or satisfaction of particular things expressed, which shall not exclude him from another benefit, though it may happen to be contrary to the will; for the Court will not construe it as meant, in lieu of everything else, when he has said a particular thing." Lord HARDWICKE, *East v. Cook*, 2 Ves. Sen.

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33. Upon that principle it was decided in *Bor v. Bor*, 3 Br. P. C. ed. Toml. 167 (see Vern. & Scriv. 53, 54), that the testator having by express proviso, made a disposition in the event of his not possessing power to devise certain estates, no implied condition arose against the heir, disappointing the devisee, but complying with the proviso. So a legatee, who cannot obtain a benefit designed for him by the will, except by contradicting some part of it, will not be precluded by such contradiction, from claiming other benefits under it. *Huggings v. Alexander*, cited 2 Ves. Sen. 31. The intention being equal in favour of each part of the testamentary disposition, no reason is afforded for controlling one, in order to accomplish the other. Under a will containing a bequest to the testator's widow, in satisfaction of all dower or thirds which she might claim out of his real or personal estate, or either of them, and a residuary bequest which failed, the widow, accepting the specific bequest, was not excluded from her distributive share of the undisposed residue. For if the Court could (which it cannot), on a question between the next of kin, advert to the will, it would find there no evidence of an intention to exclude the widow in their favour. *Pickering v. Lord Stamford*, 3 Ves. 332, 492. [See 16 R. R. 185 (2 Mer. 394)].

But although a particular benefit is given expressly in satisfaction of a particular claim, yet, if the assertion of that claim appears inconsistent with the intention of the testator, the claimant must relinquish all his rights under the will. *Graves v. Boyle*, 1 Atk. 509; *Jenkins v. Jenkins*, Bell's Supplement, p. 250.

A devise of freehold by a will not executed conformably to the Statute of Frauds, will not impose the obligation of election on the heir disputing its validity, and at the same time *claiming benefits under other clauses of the will. *Hearle v. Greenbank*, 3 Atk. 715; 1 Ves. Sen. 306, 307; *Thellusson v.* [*406,

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Woodford, 9 R. R. 175 (13 Ves. 209 ; 1 Dow, 249). A devise by an infant, is equally ineffectual for this purpose. *Hearle v. Greenbank*, 3 Atk. 695. These instances seem not so much exceptions to the rule (though commonly so described), as cases not including the fact which the application of the rule assumes. They were decided on the principle, that the devise being void for all purposes, the Court cannot advert to it as evidence of the testator's intention ; the will must be read as if that clause were expunged, and it then contains nothing to raise the question of election. Upon the same principle, the Court refused to read, for the purpose of compelling the husband to elect, a bequest of a diamond ring, in the will of a married woman, which the ecclesiastical court had adjudged to affect her separate estate only. *Rich v. Cockell*, 7 R. R. 227, 231 (9 Ves. 369, 381). But if the will affords valid evidence of the testator's intention, as by a condition annexed to a personal legacy to the heir, not to dispute the will, which not being duly executed, contained a devise to a stranger, it is settled (though the propriety of the distinction has been much questioned), that the heir must elect between the inheritance and the legacy. *Boughton v. Boughton*, 2 Ves. Sen. 12. He cannot take the legacy, without complying with the express condition. *Whistler v. Webster*, 2 R. R. 260 (2 Ves. Jun. 367, 371).

[*407, *n.*]

Before the recent statute 55 Geo. III. c. 192, giving validity to wills of copyhold without surrender, it had been decided that a specific devise of unsurrendered copyhold compelled the heir, taking other benefits under the will, to elect ; *the Court not holding itself precluded, from adverting to the devise (though otherwise ineffectual), as evidence of intention. In like manner, an heir entitled to benefits under a will directing conveyances of future purchases, on trusts specified, must give effect to that direction ; *Thellusson v. Woodford*, 9 R. R. 175 (13 Ves. 209 ; 1 Dow, 249) ; and an heir of heritable property in Scotland, taking a personal legacy under the will of his ancestor domiciled in England, which contained a general devise, void by the law of Scotland, was compelled to elect. *Brodie v. Barry*, 18 R. R. 37 (2 Ves. & B. 127). * * *

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A devisee claiming by the will, is not precluded from enjoying a derivative interest, to which he is entitled at law, under a legal

estate taken in opposition to the will; thus, a husband may be tenant by the courtesy of an estate tail, held by his wife against a will, under which he accepted benefits, *Lady Cavan v. Pulteney*, 3 R. R. 8 (2 Ves. Jun. 544; 3 Ves. 384); the estate taken in opposition to the will, vesting with all its legal incidents. Nor will the election of the heir, a married woman, between real estates the subject of a void devise, and a legacy to her separate use, affect the marital rights of the husband deriving no benefit from the rule, *Brodie v. Barry*, 18 R. R. 37 (2 Ves. & B. 127).

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(1 Swanston, 409—457.)

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By the will of S., A. his widow took a life interest, and his six children the remainder in fee as tenants in common, in his real estates, of the annual value of 870*l.*; A., under the erroneous expectation of acquiring an absolute power of disposition, having levied a fine of her husband's estates, devised a portion of them, worth about 135*l.* per annum, to G. her grandson in fee; another portion of like amount (together with an estate of her own at N., of the annual value of 115*l.*), for the benefit of the widow and children of W. her eldest son; and the residue, worth about 600*l.* per annum, to her daughter E. in fee: W. being entitled, under the will of S., as one of his children, to one-sixth, and as heir to three of his brothers who died without issue, to three-sixths, of his father's estates, devised all his real estate for the benefit of his widow and children, and died shortly before his mother A.: the widow and children of W. electing to take under the will of S., and in opposition to that of A., and by that election frustrating, to the extent of 455*l.* per annum, the disposition of the latter in favour of E., E. is entitled to the estate at N. in partial compensation.

Infants being bound to elect to take under or against a will, reference to the Master to inquire which was for their benefit.

By his will dated the 18th of June, 1747, Serle Edward Haward, being seised of certain estates at Charing Cross and in Saint Martin's, subject to a mortgage in fee, devised and bequeathed all his real and personal estate to his wife Ann Haward, (she first paying his just debts and funeral expenses), and after her decease to the heirs of her body share and share alike, if more than one; and, in default of issue to be lawfully

† *In re Lord Chesham, Cavendish v. Dacre* (1886) 31 Ch. D. 466, 55 L. J. Ch. 401.

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HAWARD. begotten by the testator, to be at her own disposal; and he appointed his wife sole executrix and residuary legatee.

The testator died in 1766, leaving Ann Haward his widow, and Edward Haward, Ann Haward, (afterwards Ann Gardner), Elizabeth, William, Francis, and James, Haward, his six surviving children by her, of whom Edward, Francis, and James died intestate and without issue, leaving William their heir.

[410] Ann Haward, the testator's widow, entered into possession of his estates, and being advised that under his will she took an estate tail, and that, the remainder in fee being in herself, she might, by levying a fine, acquire the power of disposing of the estates devised to her, on the 8th of September, 1807, executed a deed, covenanting to levy a fine, (which was afterwards levied,) and declaring, that it should enure to such uses as she should by deed or will appoint.

By her will dated the 7th of August, 1809, Ann Haward devised three messuages, (part of her husband's estates,) as to one moiety, to her grandson George Gardner in fee, and as to the remaining moiety, to B. Page, W. Watson, and R. L. Appleyard, their heirs and assigns, in trust to sell and stand possessed of the purchase money, in trust for Jane Haward, the widow of the testatrix's late son William Haward, and for such of the children of William Haward living at the testatrix's decease, as being sons should attain twenty-one, or being daughters should attain that age or be married, equally to be divided between Jane Haward and such children; with remainder, in case of all dying before their shares vested, to George Gardner, his executors, &c.; and the residue of her late husband's estates she devised to her daughter Elizabeth Haward in fee. The testatrix then devised to Page, Watson, and Appleyard, an estate at Nine Elms in the county of Surrey, to which she was entitled in her own right, upon trust, till each of the children of her late son William Haward, living at her decease, should attain the age of twenty-one years or die under that age, to permit Jane Haward to enjoy it, (if she should so long continue unmarried), to the intent that the produce might be applied by her towards the maintenance of herself and the child or children of William Haward, and upon farther trust, as soon as each *of

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the children of William Haward, living at the testatrix's decease, should attain the age of twenty-one years or die under that age, to sell the premises and stand possessed of the purchase-money upon such trusts, for the benefit of Jane Haward and the children of William Haward, as before expressed concerning the money to arise from the sale of the moiety of the three messuages devised to them ; but in case no child of William Haward should live to attain a vested interest, upon trust for Elizabeth Haward, her executors, &c. The testatrix devised and bequeathed to Elizabeth Haward the residue of her real and personal estate, and appointed her executrix.

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Ann Haward died in February, 1810, leaving William Haward the younger her grandson and heir, (heir also of his father the late W. Haward, and of his grandfather the testator Serle Edward Haward,) and the remaining children of the late W. Haward and George Gardner, her grandchildren, and Elizabeth Haward her only child.

William Haward, who died shortly before his mother Ann Haward, by his will, dated the 27th of December, 1808, devised all his real estates to Henry Gretton and Isaac Andrews in fee, upon trust to sell and stand possessed of the purchase-money, and also of his personal estate in trust, as to one-seventh, for his wife Jane Haward, her executors, &c., and as to the remaining six-sevenths, for all his children, living at his decease or born in due time afterwards, in equal shares, with benefit of survivorship between them, in case any should die under the age of twenty-one years, with remainder, in case of the death of all such children, for Jane Haward, her executors, &c. He appointed his wife, and Gretton and Andrews, executrix and executors, and declared *that the provision made for her, was intended in full satisfaction of her dower or thirds.

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William Haward died in May, 1809, leaving W. Haward the younger his eldest son and heir, and Jane Haward his widow, and five younger children.

In 1811, the trustees named in the will of W. Haward, and his widow and younger children, instituted the present suit against Elizabeth Haward the surviving daughter of Serle Edward Haward, George Gardner one of his grandsons, William

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the eldest son and heir of William Haward deceased, the trustees named in the will of Ann Haward, and the mortgagees; insisting that under the will of Serle Edward Haward, his widow Ann Haward took only an estate for life, and that William Haward, as his heir, was entitled to the reversion in the devised estates, subject to the life interests of the widow and of the other children, or if the children took estates in fee simple, then, that W. Haward was entitled to one-sixth of the devised estates in his own right, and to three-sixths as heir of the three children of Serle Edward Haward who died without issue.

The bill prayed that the will of William Haward might be established, and the trusts carried into execution; that the will of Serle Edward Haward might be established, and the interests taken thereunder by the late Ann Haward and William Haward declared; and that such part of the premises as passed to William Haward under the will of Serle Edward Haward, or as his heir, or as the heir of his other children deceased, might be sold, and one-seventh of the produce paid to Jane Haward, and the remaining six-sevenths to the trustees named in the will of William Haward, in trust for his children.

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At the hearing of the cause on the 5th of July, 1813, the MASTER OF THE ROLLS directed a case for the opinion of the Judges of the Court of Common Pleas, who certified, that under the will of Serle Edward Haward, his widow Ann Haward took an estate for life only in the devised premises; and each of her six children a fee simple in remainder expectant upon the mother's life estate, in one undivided sixth-part of the premises, as tenant in common with the other five children.†

By the decree on the 29th of July, 1816, the rights of the parties were declared conformably to this certificate; and it was farther declared, that William Haward, at the time of making his will, and of his death, was as one of the six children, of Serle Edward Haward, seised of the reversion of one-sixth part of his estates, and of the reversion of three other sixth-parts

† 6 Taunt. 94.

‡ 1 Mer. 448. This is one of a series of cases apparently overruled in *Jesson v. Wright* (2 Bligh, 1). The

report in 1 Merivale merely states that the certificate was confirmed.—C. A. S.

thereof, as the only surviving brother and heir of Edward, Francis, and James, Haward; that Elizabeth Haward was, as one of such six children, seised in her own right of one other sixth-part, and George Gardner, as the only child and heir of Ann Gardner (formerly Ann Haward) deceased, of the remaining sixth-part; the decree also declared, that the children of William Haward must elect whether they would take under or against the will of Ann Haward; and James Haward, and Edward Haward being infants, it was referred to the Master to inquire whether it would be for their benefit to take under or against the will.

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Under this decree, the adult children of William Haward, having elected to take against the will of *Ann Haward, and the Master having reported that the like election would be for the benefit of the infant; a *petition was presented by Elizabeth Haward, stating, in addition to the preceding facts, that the estates of Serle Edward Haward, were let at rents forming a total of 870*l.* per annum, of which the portion devised by Ann *Haward to the petitioner, amounted to 600*l.*, the remainder being by her devised in moieties, (of 135*l.* each,) one to George Gardner, the other, for the benefit of Jane Haward and her children by William Haward, to whom the testatrix had also devised her own estate at Nine Elms, of the annual value of 115*l.*, and who therefore, under her disposition, would take to the amount of 250*l.* only; that by the decree, the petitioner and George Gardner, take each one-sixth of Serle Edward Haward's estates, amounting to 145*l.* per annum, and Jane Haward and her children take the remaining four-sixth parts, amounting to 580*l.* per annum, by which distribution, Gardner derives a benefit of 10*l.* per annum, and Jane Haward and her children, (independently on the Nine Elms estate intended for them), of 445*l.* per annum, while the petitioner sustains a loss of 455*l.* per annum. The petition prayed, that the petitioner might be declared entitled to the estate at Nine Elms, devised by Ann Haward, for the benefit of Jane Haward and her children, by way of compensation, as far as it would extend, for the loss sustained by the petitioner of the estates devised to her by Ann Haward, which Jane Haward and her children have elected to

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take against the will of Ann Haward; and that in taking the accounts directed by the decree, of the rents of Serle Edward Haward's estates, the Master might allow to the petitioner a proper sum, in compensation for the rent of the estate at Nine Elms, from the death of Ann Haward, till the petitioner should be let into possession, to be paid from the share of Serle Edward Haward's estates, to which Jane Haward and her children should be found entitled.

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The petition having, on the last petition day, been ordered to stand over for argument was this day argued.

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Mr. Horne and Mr. Shadwell for the petition. * * *

Mr. Wray, for William Haward, the heir of his father, of Ann Haward, and Serle Edward Haward :

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I admit that where the ancestor devises to his heir an estate of which he has power to dispose of, and to a third person another estate settled on the heir, and the heir asserts his rights under the settlement, he shall not retain the estate given to him by the will. Here the estate which the petitioner claims was devised for the benefit, not of the heir alone, but of the widow and all the *children of his father; and it is by the joint election of those persons, not the single election of the heir, that the intention of the testatrix in favour of the petitioner is frustrated. The doctrine of compensation has been applied in bequests of personalty, or devises disappointed by the election of the heir, but it has never been extended against the heir in the instance of devises disappointed by the election of others. The devisees electing to claim against the will, the estate designed for them becomes, in the event, undisposed of, and belongs therefore to the heir; upon what principle can the Court take from him, for the benefit of the petitioner, the shares of that estate which those devisees have by their election abandoned? Admitting that his own share is within the doctrine supposed, no case has decided that he is not entitled to retain the shares which, by reason of the election of others, devolve to him as undisposed of. The devise on trust cannot affect the

question; the estate in the trustees is neutral, and the point must be determined as if the legal estate had descended to the heir.

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Another question is, whether the Court will interfere in the instance of partial disappointment? A course which would involve great difficulties of calculation. * * *

A third peculiarity of this case, and a distinct objection to this petition, is, that the petitioner herself, in effect, takes against the will of her mother; her interest in the estates of Serle Edward Haward, devolves on her as his devisee; a character inconsistent with that in which she claims compensation.

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Mr. G. Wilson, for the plaintiffs, insisted, that if the petitioner was entitled to the estate at Nine Elms, allowance must be made for sums expended by the plaintiffs in its improvement.

THE MASTER OF THE ROLLS [after making some general observations on the doctrine of election, said :]

I cannot say that I am at all satisfied that the mere circumstance of peculiarity in this case, that the heir at law is one of the individuals who have made election, ought to distinguish it. Though a party must be taken to have elected, still if a new right arises, not adverted to at the time, as no one is ever compelled to elect till the whole subject matter has been ascertained, and he knows all *his rights on each side, the Court would, according to its habit, indulge him with farther opportunity to be informed of his interests. It is to be considered also, that the heir is bound to elect, and has made election, not in the character of heir, but between two instruments in neither of which is that character concerned; he is required to declare whether he will abide by the will of Serle Edward, or by the will of Ann; of these he prefers the former, but that choice has no connection with his claim as heir. When the heir asserts his paramount title, no Court is authorised *a priori* to impose any condition on him. Insisting on his right before the will was made, and declining to accept any benefit under it, what authority has this Court to annex a qualification? To deprive him of a title prior to any will? I think, therefore, that neither of these points is

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conclusive ; but the fair way of considering the question, and the true test, is this ; supposing the heir not interested in either instrument, nor having made any election, to advance a claim to this *hereditas jacens*, alleging that the estate not being accepted by the person for whom the testator destined it, is in effect given to no one, and therefore (as a devise lapsed by the death of the devisee in the life of the testator) devolves to him in his character of heir ; supposing him thus neither affected by any antecedent acts, nor interested in the property under an instrument varied by the wills of his father or grandmother, how would the Court deal with his claim ? On general principles, it might be said, that the estate not being in the event effectually given, the devisee (who cannot be permitted to enjoy a double benefit, both the property devised to him, and property the title to which is inconsistent with the will), must indeed relinquish it, but that what is then to be done with it, is a quite different question. The doubt is, does it pass to the heir, as, in the actual event, undisposed *of, the will being frustrated ; or come into the hands of the Court, under an authority to apply it for the benefit of the person who has been disappointed ? If that authority has been constantly exercised, however disputable in its nature, it cannot now be impeached.

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Few cases are to be found on the subject, but it must be acknowledged that the language of the great Judges by whom it has been discussed, proceeds to the extent of ascribing to the Court an equity to lay hold on the estate thus taken from the devisee by the principle of election, and dispose of it in favour of those whom he has disappointed ; not merely taken it from one, but, such is the uniform doctrine, bestowing it on the other. A doctrine not confined to instances in which the heir is put to election, and which may be said to bring him within the operation of the general principle, but prevailing as an universal rule of equity, by which the Court interferes to supply the defect arising from the circumstance of a double devise, and the election of the party to renounce the estate effectually devised ; and instead of permitting that estate to fall into the channel of descent, or to devolve in any other way, lays hold of it, to use the expression of the authorities, for the purpose of making satisfac-

tion to the disappointed devisee: a very singular office; for in ordinary cases, where a legatee or devisee is disappointed, the Court cannot give relief; but here it interposes to assist the party whose claim is frustrated by election. Such is the language of Lord Chief Justice DE GREY, cited with approbation by Lord LOUGHBOROUGH; "the equity of this Court is to sequester the devised estate *quousque* till satisfaction is made to the disappointed devisee."† I conceive it to be the universal doctrine that the Court possesses *power to sequester the estate till satisfaction has been made, not permitting it to devolve in the customary course; out of that sequestered estate so much is taken as is requisite to indemnify the disappointed devisee; if insufficient, it is left in his hands. In the case to which I have referred, Lord LOUGHBOROUGH uses the expression, that the Court "lays hold of what is devised, and makes compensation out of that to the disappointed party."

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A distinction has been attempted between real and personal property: I cannot see a principle on which the Court could think itself at liberty to sequester and distribute personalty, in the event not given to the individual intended, that would not apply equally to realty; the object being to direct the devolution of the property in a course prescribed by equity. Undoubtedly in the instance of personalty, satisfaction has been repeatedly given. In a case not reported (the name of one of the parties I recollect was Brodie) the property being divided into eleven parts, the Court followed it, for the purpose of satisfaction; and in several cases, anticipating either contingency, the decree has provided for the event of election to take against the will, by a direction for making compensation out of the estate. It would be too much now to dispute this principle, established more than a century, merely on the ground of difficulty in reducing it to practice, and disposing of the estate taken from the heir at law without any will to guide it; for to this purpose there is no will; the will destined to the devisee, not this estate but another: he takes by the act of the Court; (an act truly described as a strong operation;) not by descent, nor by devise, but by decree; a creature of equity.

† *Lady Cavan v. Pulteney*, 3 R. R. 21 (2 Ves. Jun. 560).

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If this doctrine were now advanced for the first time, some objections might seem to occur to it. The disappointment *of the devisee not arising from any wrong done to him, or any right withheld from him, but resting in the loss of a gift, from a want of title in the testator to dispose of what is given, how does it afford any claim to compensation in a court of justice? The testator might have anticipated and provided for this event, and have, in such case, substituted one estate for the other; and, perhaps, if he were now living, this is what he might wish to do; but not having expressed any such intention in his will, how can the Court supply the omission, and make a new will for him, giving one estate not devised, in lieu of the estate which was? In what way too is this to be effectuated, so as to invest this disappointed devisee with a clear and indefeasible title in the estate thus given him by the Court? Did the estate pass under the devise or did it not? If in consequence of the election and the noncompliance with the implied condition, the devisee is precluded from taking the estate, and no other disposition of it is made by the will, must it not devolve on the heir at law as being in event undisposed of; and if so, what equity is there against the heir, supposing him no party to the election, to restrain him from recovering in ejectment; or if not restrained, how is any defence to be made against his claim under the devise, which the devisee is precluded, by his election, from availing himself of, as well in law, according to Lord REDESDALE,† as in equity? How too

[*426] *is the devisee ever to obtain the legal estate, or to perfect his

[*427] title without a conveyance from the heir at *law? And if there be no equity against him, how is a court of equity to compel him

[*428] to part with his inheritance, *favoured as that title in general is both in law and equity?

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If the other alternative is taken, the only way of avoiding the apparent contradiction of considering the *estate to pass by the will for one purpose, and not to pass for another, is to separate the legal estate from the *beneficial, and to allot the former

† 2 Sch. & Lef. 450, and see Lord ROSSLYN to the same effect, 3 R. R. 35 (2 Ves. Jun. 696). It is unnecessary now to refer to Mr. Swanston's

note in support of his contention that the doctrine of election is exclusively equitable.—O. A. S.

only to the devisee, and reserve the latter for the disposition of the Court; but where is the ground for that separation; the will, if it is to operate at all, having given both the legal and the equitable interest to the same person, and laid no ground in the intent of the deviser for any distinction in their destination?

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The devisee's election to abide by his own estate may properly operate to preclude his taking the devised estate; but how can it make him take in a different character, and convert him into a trustee for another, to whom the testator has not expressed any intention to give it? The disappointed devisee in respect to the estate devised to another has no title whatever to that estate, either under or *dehors* the will; What equity then has he to it?

These are some of the difficulties which might have been urged by way of objection to this part of the doctrine of election, had it been now open to discussion; in the present case, however, some of these difficulties are obviated, *and the doctrine in its full extent has been too long considered as settled to make it safe to disturb it.

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The question then is, will the circumstances in which Elizabeth Haward is placed, prevent the application of this doctrine? Taking a benefit by the election, not of herself but of another, her situation is certainly in some degree peculiar. Under the election of the widow and children of William Haward, to abide by the will of his father Serle Edward Haward, the estates of the latter becoming divisible, the petitioner takes one-sixth; the question is, whether having by the election of other parties, acquired a right not intended for her by her mother, she can now insist on satisfaction for the disappointment of the devise contained in her mother's will, while she enjoys a benefit which has come to her against that will? That question is certainly new; no case has occurred in which an individual in part satisfied, deriving from one source a partial, has been declared entitled to additional, compensation. It has been ingeniously argued, that as the doctrine of bringing into hotchpot antecedent portions, is not applicable to a case of partial intestacy, the doctrine of compensation cannot be applied to partial disappointment; but that analogy will not, in my opinion, justify a departure from the

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ordinary rule. If the petitioner is the only individual disappointed, being deprived of an estate of 600*l.* a-year destined to her, and taking an estate of 145*l.* a-year only, and if the estate at Nine Elms is now in the hands of the Court, has not the established practice determined that it is to be applied in satisfaction of her as a disappointed devisee? To the extent of the difference between 145*l.* and 600*l.*, she sustains that character. Difficulties in the calculation of quantity may be removed by a reference to the Master; plus or minus cannot vary the rule; here is disappointment; and I *think that the circumstances of novelty cannot so entrench on the entirety of the principle, as to authorise me in refusing compensation.†

- [434] The only remaining question is, on what terms must compensation be made? From what time is the estate *at Nine Elms to be given up to the petitioner? The election is retrospective; reverting to the time of the *will, the parties electing reject all that comes under it; consequently they have in the interval enjoyed the *property of another; to retain the past rents and profits which they have received with no other title than that *conferred by the will, would be to claim under it; renouncing the will, they admit that they have been in *possession of an estate without title. There must be a retrospective account of rents and profits, and an account *of sums expended for melioration of the estate, which must be reimbursed.

[The concluding part of Mr. Swanston's note, referred to in the editorial note below, is here inserted.—O. A. S.]

- [441, n.] This deduction of authorities appears (in the instance at least of election under wills and deeds of donation) to establish two propositions; 1. That, in the event of election to *take against the instrument, courts of equity assume jurisdiction to

† Mr. Swanston here inserts a note containing a very full discussion of authorities in support of the proposition that the doctrine of election imposes compensation and not forfeiture of the interest of a person electing to take against a will. The point is now settled, and the discus-

sion of authorities is consequently here omitted as unnecessary; but the conclusions which Mr. Swanston draws from the authorities, and his general observations on the subject towards the end of his note, are retained in a note at the end of the judgment in this case.—O. A. S.

sequester the benefit intended for the refractory donee, in order to secure compensation to those whom his election disappoints: 2. That the surplus, after compensation, does not devolve as undisposed of, but is restored to the donee, the purpose being satisfied for which alone the Court controlled his legal right.

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Assuming that the doctrine of election is equitable only, the infliction of forfeiture on a devisee electing to take against the will, beyond the extent of compensation to those whom his election disappoints, would be inconsistent with the principle on which the doctrine rests. By the assumption, the devise of the testator's property has vested the legal estate in the devisee; but a court of equity, (in the contemplation of which his conscience is affected by the implied condition) interfering to control his legal right for the purpose of executing the intention of the testator, is justified in its interference so far only as that purpose requires. In the common case of election to take against a will containing a devise of the property of the testator to his heir, and a second devise of the property of the heir to a stranger, the express intention of the testator, that the heir should enjoy the subject of *the first devise, and the stranger, the subject of the second, is defeated by the refusal of the heir to convey the latter; and a court of equity therefore restrains him in the enjoyment of the first, till the condition, under which, in the contemplation of that Court, it was conferred on him, is satisfied. The intention of the testator, having become impracticable in the prescribed form, is executed by approximation, or in the technical phrase, *cy pres*. The devise to the stranger, rendered void as a gift of the specific subject, is effectuated as a gift of value, and effectuated at the expense of the heir by whose interference its strict purport has been defeated. By this arrangement, the intention of the testator in favour of the stranger, though defeated in form, is, in substance, accomplished; his intention, in favour of the heir, equally express, remains to be considered.

[*443, n.]

If the value of the estate retained by the heir exceeds the value of the estate designed for him, his own act is his indemnity; the benefit which he enjoys transcends the intention

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of the testator ; but if the value of the estate of which the Court deprives him, exceeds the value of the estate of which he deprives the devisee, what disposition is to be made of the surplus ? Considered as a gift of value, (and on that principle the equitable arrangement is founded,) the devise to the stranger entitles him to an equal amount, but is no authority for bestowing on him more ; and the undisputed intention of the testator being that the subjects of both devises *should be enjoyed by the heir and the devisee, what is not transferred to the devisee must remain with the heir.

[*444, n.]

A court of equity, which assumes jurisdiction to mitigate the rigor of legal conditions, and substitute for a formal a substantial performance, would act with little consistency in enforcing, by the technical doctrine of forfeiture, to the eventual disappointment of the testator's intention, a condition, not expressed in the will, but supplied by the construction of the Court, for the single purpose of executing that presumed intention.

In the instance of pecuniary claims, the question can scarcely arise, since, in a choice between two sums of money, no probable motive exists for electing the smaller ; but supposing that case, as a gift to a stranger of the benefit of a settlement under which the heir of the testator was entitled to 1,000*l.*, and a bequest of 5,000*l.* to the heir, and election by him to take under the settlement ; by the deduction of 1,000*l.* from the bequest, in satisfaction of the disappointed legatee, and by payment to the heir of the remaining 4,000*l.*, together with the sum due under the settlement, the intention of the testator would be executed in substance, though not in form ; the heir would take 5,000*l.* and the legatee 1,000*l.* : by any other arrangement that intention, which must inevitably be violated in form, would be substantially defeated.

The case of specific gifts may, indeed, involve some difficulty of appreciation, by the existence of local attachments, which admit neither accurate estimation nor adequate compensation ; but it is on the principle of appreciation that the Court interferes, to transfer to one party, that which is expressly, and at law effectually, given to another ; and the *difficulty has been

[*445, n.]

repeatedly encountered. Should any case present impediments of this nature practically insurmountable, the doctrine of compensation might become, in that instance, inapplicable, but would not for that reason cease to be the general rule of the Court.

By the doctrine of compensation, and the process of sequestration for executing it, (though justly described as a strong operation,) the intention of the testator is, so far as circumstances admit, effected; by the doctrine of forfeiture that intention would be defeated.

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(1 Swanston, 460—470; S. C. 1 Wilson, 297.)

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Stipulations in articles of partnership for an annual settlement of accounts, and for payment to the representatives of a deceased partner, of an allowance in lieu of profits since the last actual account, proportioned to the amount of his share of profits, during two years preceding, are waived in equity by omission through several years to settle annual accounts, and by engaging in business in which the stipulations cannot be applied without injustice; and an injunction was granted to restrain the representatives of a deceased partner from proceeding on a bond given by the surviving partners, for repayment of his share according to the articles, before the settlement of accounts of transactions pending at his decease, on which a loss was subsequently sustained.

By articles of partnership, dated the 29th of May, 1809, between Richard Cookes (since deceased) George Lord Jackson, and John Milthorpe Maude, after reciting that Cookes and Jackson had, for several years, carried on the trade of ship-agents, ship-brokers, and insurance-brokers, as partners, and that it had been agreed that their partnership should be dissolved, and that Cookes, Jackson, and Maude, should enter into partnership, in that business for the term of seven years, to be computed from the 1st of July then last, and that their capital should be 10,000*l.*, 6,000*l.* to be brought in by Cookes, and 2,000*l.* by each of the other parties; and farther reciting, that the shares of certain ships, the property of Cookes and Jackson had been valued at different sums, amounting to 1,140*l.* which

† *Lawes v. Lawes* (1878) 9 Ch. D. 98.

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was to be considered as so much capital brought into the trade by them, in part of their proportions, and to bear interest from the 1st of July then last ; the parties covenanted, that they would be co-partners in the business of ship-agents, ship-brokers, and insurance-brokers, and in all things incident thereto, and in all such other business as they should agree upon, for the term of seven years, to be computed from the 1st of July then last ; that the capital of the partnership should consist of 10,000*l.*, which should remain therein during its continuance, unless Cookes should happen to die before its expiration, in which case 4,000*l.* were to be repaid to *his executors or administrators, in the manner thereafter provided ; and that, as Cookes had brought in and would continue in the co-partnership, during the continuance thereof, or so long as he should be living, 4,000*l.*, being part of the 6,000*l.* above mentioned, over and above the proportions which Jackson and Maude had brought in, the joint stock, profits, and effects, should be liable to the re-payment thereof ; and in case the same should be deficient, the other parties should make good a proportion thereof out of their private property. The articles then provided, that all losses which should arise by reason of bad debts, fire, or other accidents in carrying on the trade, and all expenses of the co-partnership, should be defrayed as follows ; 50*l.* annually by Cookes, out of his separate estate, and the residue out of the profits of the trade, or by the parties, in the proportions of three-eighths by Cookes, three-eighths by Jackson, and two-eighths by Maude.

The articles farther provided that the parties should, on the 31st December, in each year, or as soon after as possible, make up and pass an account in writing of all their dealings and transactions, and make a settlement or balance thereof, so that the true state of the same might appear, and of the profits of the trade, and how much was coming to each of the partners ; (the amount of each partner's share of the profits to be carried to his separate account in the partnership books, and there to be at his disposal, and to be drawn out of the trade when he pleased, each partner being entitled to recover interest upon the amount of his capital in the business, before any division of the profits) ; that the same should be written in three several books,

each of which should be subscribed by all the parties ; and that such accounts, so passed and subscribed, should not be opened or called in question, but should be binding on all parties, their *executors and administrators, unless some special error, to the amount of 30*l.* or upwards, should appear plainly to have escaped their notice, and should be discovered within three years from the making up such accounts ; and in case either of the parties should refuse to attend to take such accounts, and sign the same, for the space of ten days after being required, it should be lawful for the other or others of them to proceed to take such account, and to sign the same, and to call to his or their assistance such other ship-agent, or ship-broker, or policy or insurance-broker, as he or they might choose ; and such accounts, if taken and signed by the other party or parties, within thirty days next after the expiration of such ten days, should be final and binding, and not be opened or unravelled by the partner or partners making default, but be considered conclusive against him or them, provided a copy of such account be delivered to, or left with him or them within thirty days, accompanied with an affidavit, that to the best of the knowledge and belief of the party or parties so signing such accounts, they were just and true accounts between the parties.

The articles next provided, that no benefit of survivorship should be taken by any of the parties in case of death ; and that if Cookes or Jackson should die during the continuance of the partnership, their executors and administrators should be entitled to an allowance from the survivors, or from Maude alone in case of both their deaths, during the remainder of the partnership term of seven years, of the annual sum of 400*l.* ; such allowance being secured in manner therein directed, with respect to the share of the partners or partner dying during the partnership of the joint stock or profits ; and Maude, his executors or administrators were intitled in a like event, to an annual sum of 300*l.* The articles proceeded to *provide, that in case any of the parties should die within the partnership term, his executors or administrators should be entitled to receive from the survivors an allowance in lieu of all profits, from the day of the then last actual rest, to the day of such decease, in proportion

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to the amount of the profits which the party dying should have received, or been intitled to receive, out of the profits of the trade from the commencement of the partnership to the then last rest, in case two full years should not have elapsed from the commencement of the co-partnership; but in case two years should have elapsed prior to such last rest, then in proportion to the profits accruing in respect of such two years immediately preceding such last rest; and that such allowance should be paid within six months to the respective executors or administrators of Cookes and Jackson, or such of them as should die within the term aforesaid, and should also be secured in the manner therein directed, with respect to the share of a partner dying during the co-partnership in the joint effects.

After a provision for diminishing the annual allowance to the representatives of a deceased partner, in proportion to the deficiency of his capital, the articles declared, that upon the death of any of the parties during the partnership, his share in the joint stock, profits, and effects, up to the 31st December immediately preceding his decease, or the value thereof, should be paid or secured to his executors or administrators in manner following: viz. as to 2,000*l.*, part thereof, one-third part, with interest at 5 per cent. per annum (to be computed from the expiration of the co-partnership term of seven years), at the end of six months, one other third part with interest, at the end of twelve months, and the remaining third part, with interest, at the end of eighteen months, ensuing the expiration of the

[*464] *co-partnership term; and the surviving party or parties should be entitled to retain the same in the business until such respective times, upon giving the security thereafter mentioned; and as to all such sums of money, estate, and effects, as should belong to such deceased partner, above the said 2,000*l.*, and particularly as to 4,000*l.* which Cookes had brought in more than Jackson and Maude, the same respectively should be paid to the executors or administrators of such deceased partner or partners in manner following: viz. one-third part thereof, with interest, from the day of his death, at the expiration of six months; one-third with interest at the expiration of twelve months; and the remaining one-third with interest, at the

expiration of eighteen months, from his decease; and the same should be secured to be paid in the same manner as the 2,000*l.* and interest, and the annual allowance.

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It was finally provided, that on the decease of any of the partners during the partnership, the last rest or balance of account signed by the deceased partner, and the survivor or survivors, should be referred to, and what should then appear to have been the amount of the capital of such deceased partner at such last rest, should be considered as his capital, and should not, under any pretence whatever, be disputed, or called in question; and that, in case any of the partners should die during the partnership, and upon or after such decease, his representatives should become entitled under the previous provisions, to the payment of his share of the capital stock and profits, and to the payment of such annual allowance as aforesaid, then for securing the payment of so much money as the full value or share of such deceased partner would amount to, in such capital, stock, and profits, at the time therein mentioned for payment thereof, with interest, *and also for securing payment of the annual sum therein agreed to be allowed to the executors or administrators of the party so dying, the surviving partner or partners should, within one month after his decease, with one other sufficient surety, become bound to his executors or administrators, in one or more bonds with double penalty, conditioned for payment, to such executors or administrators, of such monies or interest and allowances at the time therein mentioned; and should also become bound to such executors or administrators in one or more bonds of sufficient penalty for indemnifying them from all debts and duties which, at the time of such decease, were jointly owing by the partners, on account of the partnership, and from all actions, suits, and expenses for or about the same, which debts and duties the surviving partners agreed to pay and satisfy in convenient time; and that the executors or administrators of the party so dying, upon the sealing and delivery of such bond, should release to the surviving partner or partners all right and interest in all the estate and effects (other than such debts as were next thereafter mentioned) and profits of the partnership which, at his death,

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were due and belonged to the parties on account of the said business; and that in case any of the parties should die during the partnership, all such bad and desperate debts owing to or on account of the business, as should not have been accounted a good estate, and as such included in the yearly account or accounts to be made up and stated as aforesaid (if any such account should have been stated) should, with all convenient speed, be divided between the surviving partners, and the executors or administrators of the deceased, in proportion to their respective shares in the profits of the business, and thereupon the surviving partners, and the executors and administrators of the deceased, should give to each other and his and their executors and administrators, full *power to sue for and recover their respective shares of such bad debts.

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The partnership commenced on the 1st of July, 1808, and continued till the death of Cookes on the 10th of January, 1815. At that time the books of the partnership were in arrear; no accounts had ever been signed by the partners, or considered as closed; sketches or drafts of the general dealings of the partnership, and of the profit or loss, had been made for the years from 1808 to 1812, but not until after the expiration of twelve or eighteen months beyond the close of the year to which they respectively refer; but no account, or sketch, or draft of an account, had been made for the years 1813 and 1814.

Previously to the 31st of December, 1814, the partners had engaged in various adventures by shipment of goods and otherwise, which, at the death of Cookes, were depending, and the result of profit or loss unascertained. In some instances a loss was then probable, and had since occurred.

On the 27th of July, 1815, Jackson and Maude, together with E. M., as their surety, executed to the executors of Cookes, a bond in the penalty of 10,000*l.*, reciting that Jackson and Maude had paid to the executors the proportion of the annual sum of 400*l.* in the articles stipulated to be paid in case of the death of Cookes, and also the sum of 1,339*l.* 6*s.* 8*d.* being one-third of 4,000*l.* with interest from his death, pursuant to the articles, but that no other payment had then been made to them; that the partnership term of seven years expired on the

1st July then instant, and that the accounts of the partnership were not made up and passed upon or after the 31st December, in each year, as agreed by the articles, *so that the true state of the same, and of the profits of the trade, and how much was coming to the representatives of Cookes did not, at the time, appear; but that it had been agreed that, in pursuance of the articles of co-partnership, Jackson and Maude, with E. M., as their security, should execute the bond; with condition to be void, if Jackson and Maude should pay to the executors the several sums of money at the several times thereafter mentioned; viz. 666*l.* 13*s.* 4*d.*, being one-third of the 2,000*l.* with interest at 5 per cent. per annum, to be computed from the 1st July then instant, on the 1st of January, 1816; 666*l.* 13*s.* 4*d.* with like interest, on the 1st July, 1816; and 666*l.* 13*s.* 4*d.* with like interest, on the 1st of January, 1817; 1,333*l.* 6*s.* 8*d.*, another third part of the sum of 4,000*l.*, with interest at the same rate, from the 10th of January then last, on the 10th of January, 1816; and the farther sum of 1,333*l.* 6*s.* 8*d.* with like interest, on the 10th July, 1816; and also if Jackson and Maude should pay to the executors at the times and in the manner stipulated in the articles, and with interest as therein mentioned, all such sums of money as should belong to and be the share of Cookes, above the sums of 2,000*l.* and 4,000*l.*, in the joint stock and effects, and the profits of the trade or otherwise howsoever, by virtue of the stipulations in the articles, and not exceeding, together with the sum of 1,333*l.* 6*s.* 8*d.* before mentioned, the sum of 10,000*l.* (to which last-mentioned sum the bond was limited for the purpose of ascertaining the stamp duty thereon); and in case upon settling the accounts of the partnership, it should be found that the representatives of Cookes were not entitled to receive so much money as the whole of the sums of 2,000*l.* and 4,000*l.*, a proportionable abatement should be made from the last of the payments therein conditioned to be made.

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The surviving partners paid to the executors of Cookes, on account of this bond, sums amounting to about 3,400*l.*, and the executors having since commenced an action on the bond, the bill was filed by the surviving partners and their co-obligor in

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bond, insisting, that the balance of profit and loss on the co-partnership concern, up to the 31st of December, 1814, ought to be ascertained by consulting the result of all engagements in which the firm was then embarked, and for which it was responsible; that the losses sustained in consequence of such engagements should be brought into the account between them and the executors; and that after the just deduction, in respect of such losses, Cookes' share in the business did not exceed 3,000*l.*, being less than the sum already paid by the plaintiffs on account of the bond.

The bill, charging that unless the accounts were taken the plaintiffs could not prove at the trial that the bond had been satisfied, prayed, an account of the partnership transactions; that the share of Cookes, at his death, might be ascertained; an account of all sums paid by the plaintiffs in respect of his share; that the defendants might repay what should appear to have been overpaid to them, and might deliver the bond upon being paid what, if anything, remained due; and, in the meantime, be restrained from proceeding at law.

[*469] The defendants, by their answer, submitted that according to the true construction of the articles, the accounts of the co-partnership transactions should be settled on or down to the 31st December, 1814, as the transactions stood on that day, and that such accounts, when so adjusted, should be conclusive on all parties, unless an accidental error to the amount of 30*l.* and upwards *should be discovered therein, and that no subsequent transactions, whether of profit or loss, or any subsequent losses or profits of the then depending adventures, should be brought into the account either to the debit or credit of Cookes, or of any partner who died before the expiration of the term; and that they ought not to be charged with any part of the loss occasioned by the bankruptcy of persons indebted to the partnership at the death of Cookes, and then believed to be solvent.

April 16.
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On this day the plaintiffs moved for an injunction to restrain the defendants from proceeding in the action on the bond.

Mr. Hart, Mr. Bell, and Mr. Collinson in support of the motion.

Sir Samuel Romilly, and Mr. Roupel, against the motion.

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THE LORD CHANCELLOR :

The articles of partnership seem to refer only to the trade of ship-agents and brokers ; and it is difficult to apply them to trade of another description. The question will be whether the proceeding *de anno in annum* without settling the accounts, and the engaging in business not contemplated by the articles, are not evidence of the intention of the parties to waive the agreement ? Partnership accounts may be taken in various ways ; the distinction is, that in the absence of a special agreement, the accounts must be taken in the usual way ; but where a special agreement has been made, it must be abided by, provided that the parties have acted on it ; if not, I always understood that the articles are read in this *court as not containing the clauses on which the parties have not acted. There would be no difficulty in applying the articles to the particular business with reference to which they were framed, but if the parties engaged in business in which their application would work injustice, as in importation or exportation, where the returns could not be ascertained at the period limited, then, I say, that these articles, though they contain a general reference to other business, are not such as would have been prepared with relation to that specific business ; and that engaging in that business affords a reason for not performing the stipulations. Considering the difficulty of now making up the account, after an interval of four or five years, I cannot, at present, think the executors of the deceased partner entitled to insist on the articles. I will read them ; but unless I intimate a change of opinion, the motion must be granted.

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On this day the LORD CHANCELLOR declared, that after reading the articles of partnership, and the bond, he retained the opinion which he formerly expressed, and granted the injunction.

April 25.

The order restrained the defendants from all farther proceedings in the action against the plaintiffs, “ until the bearing of this cause, and the farther order of this Court.”†

† Reg. Lib. A. 1817, fol. 1387.

1818.

April 16, 18.
July 17.

ELDON, L.C.

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WILSON v. GREENWOOD.†

(1 Swanston, 471—485; S. C. 1 Wilson, 223.)

Articles of partnership having provided, that on dissolution by death, notice, or misconduct, of a partner, the remaining partners should have the option of taking his share at a valuation, payable by yearly instalments in the course of seven years; and that on the bankruptcy or insolvency of a partner, the partnership should be immediately void as to him; by a deed, four years subsequent, the partners declared (after a recital that such was their intention in the articles), that in the event of bankruptcy or insolvency, the same arrangement should be practised as on dissolution by death, notice, or misconduct: one of the partners having become bankrupt within a few months after the execution of the latter deed, his assignees are not bound by it. Whether a provision in articles of partnership, that on the bankruptcy of a partner his share shall be taken by the solvent partners, at a sum to be fixed by valuation, and payable by instalments in a course of years, is not void by the statutes concerning bankrupts, *Quære*.

JOHN GREENWOOD, Jonas Whitaker, and William Ellis, having agreed to become partners in the business of cotton spinners, by indenture dated the 20th of October, 1812, covenanted that the partnership should continue for four years from the 30th of June preceding (determinable by death, misconduct, or notice); but if not dissolved by the death of any of the partners, or for such misconduct as therein after-mentioned, or if none of the partners should give twelve months' notice in writing, of his intention to terminate it at the expiration of that period, the partnership should not then cease, but should continue until one of the partners should give twelve months' previous notice in writing, of his intention to dissolve it; and thereupon, at the expiration of such twelve months, the partnership should cease, as to the partner giving such notice.

The articles of partnership farther provided, that immediately after the determination of the partnership, either by the death of any of the partners, or by notice, or for misconduct as therein after mentioned, a final account should be made and settled of the co-partnership, and the property belonging thereto, and all the debts then owing by or on account thereof; and the excess of capital which any partner, or the executors or administrators of any partner, might then have in the partnership, above the share

† *Ex parte Mackay* (1873) L. R. 8 Ch. 643, 646, 42 L. J. Bky. 68.

of the other partners, or *their executors, should be discharged out of the partnership effects; and all the effects (including the real estate) of the co-partnership, should be valued by three indifferent persons, one to be named by each of the partners, or by the executors or administrators of a deceased partner; and in case any of the partners should refuse to join in such nomination, the three referees should be named by the other or others of the partners interested in the valuation; and the determination of the referees (who were empowered to employ, at the expense of the co-partnership estate, competent persons to estimate the value of the respective properties,) should be conclusive as to the value; and upon such valuation being perfected, the surviving or continuing partner or partners, should have the option of purchasing the share of the partner so dying or withdrawing, at the price ascertained by such valuation, and should be allowed two months from the date of the valuation, for making such election; and in case of any difference in judgment between the referees, they, or any two of them, should appoint an umpire, whose judgment should be conclusive; and the determination of the referees, or any two of them, should bind the several partners, their respective executors and administrators, to complete the sale and purchase of the share of every partner so dying or withdrawing, by making and accepting a release and assignment thereof, at the price so ascertained; but such partners or partner, continuing to carry on the trade, and becoming the purchasers or purchaser of the share of the partner dying or withdrawing, should be allowed the term of seven years for the payment of the price or purchase-money thereof, by equal yearly instalments, with interest for the purchase-money, or the unpaid part thereof, from the determination of the partnership until payment of the instalments respectively; and the purchase-money and interest should be *effectually secured by a mortgage of the share so sold, and such bond or farther assurance, as by such retiring partner, or the executors of such deceased partner, should be reasonably required; and in such bond or other assurance, should be inserted a proviso, whereby, if default should be made in payment of any of the instalments for the space of one month,

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the whole of the purchase-money should become an immediate debt; and if the partners so continuing to carry on the trade, should refuse or neglect for two months from the date of the valuation, to declare their intention of becoming the purchasers of the share of the partner so dying or withdrawing, at such valuation, the parties would, within two months after such refusal or neglect, join in a sale of the entirety of the effects of the partnership, by public auction; and it was declared, that the parties were joint and equal partners, as well in the mills and other effects, as in all profits of the trade, and that they would bear equally all losses.

It was farther declared, that if any of the partners should become bankrupt or insolvent, the partnership, with respect to such partner, should be immediately void; and that upon the ceasing of the partnership, a final account in writing should be taken and entered in the co-partnership books, of the property belonging to or employed in the trade, and also of all debts and engagements due from or entered into by the partnership; and true copies of such accounts should be delivered to each of the parties, or their respective heirs, executors, or administrators, the same, and the copies thereof, to be signed by all the partners, testifying their settling and approving thereof; and that thereupon the co-partnership estate and effects should be sold and converted into money; and after payment of the debts and engagements of the partnership, the residue should be

[*474] *equally divided between the parties, according to their shares in the co-partnership; but if the monies arising from such sale should not be sufficient to satisfy the debts and engagements, the partners should sustain such deficiency equally.

The partnership continued till the 9th of November, 1816, when a joint commission of bankruptcy was issued against Ellis, and certain persons with whom he was connected in a business distinct from that in which Greenwood and Whitaker were interested.

The bill filed by the assignees of Ellis against Greenwood and Whitaker, prayed a declaration, that the partnership under the articles of October, 1812, was determined by the bankruptcy of Ellis, and that the plaintiffs, as his assignees, were entitled

to have all the partnership property, as well real as personal, sold; and an account of the particulars of which, at the date of the commission, it consisted, and of the subsequent application or disposition thereof by the defendant; that the outstanding debts might be collected, and all the partnership accounts liquidated; that the clear surplus of the partnership property, and the proceeds thereof, and of the profits of the concern to the issuing of the commission, might be ascertained, and the share due to the bankrupt's estate paid to the plaintiffs; and that if it should appear that the defendants had, since the issuing of the commission, carried on the trade, or used the partnership property for their own benefit, they might be compelled to account to the plaintiffs for a moiety of such profits, or interest on the amount of the bankrupt's share from the date of the commission, at the option of the plaintiffs; and a receiver or manager of the partnership property.

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On this day the plaintiffs moved, on affidavit before answer, for a receiver and manager.

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The affidavit, in opposition to the motion, stated, that by indenture dated the 8rd of July, 1816, between Greenwood, Whitaker, and Ellis, after reciting the articles of co-partnership, and that the parties conceived they had not thereby (although their original intention was so to do), in the case of bankruptcy or insolvency of any one of the parties, or in those cases followed by notice amounting to a dissolution of the co-partnership, sufficiently provided for the circumstance of any two solvent partners, or any two partners desirous to continue as between themselves the co-partnership, carrying on the same on the terms and conditions annexed to the two cases of a partner dying or withdrawing voluntarily from the co-partnership; and that the parties, being desirous to place every case of a dissolution of the partnership, which should apply to or arise upon the going out, voluntarily or involuntarily, of any one of the partners, on the same footing, should the same happen by death, under a notice of withdrawing, from bankruptcy, insolvency, or for any other reason mentioned in the articles of partnership as causes of dissolution, had agreed to execute the

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present instrument to give effect to their intention, and for carrying into effect their agreement and meaning; the parties covenanted with each other, that in all cases of a partial dissolution of the co-partnership, wherein one only of the parties should withdraw from the co-partnership concern, or cease to have any interest therein, whether the same should happen with or without his consent in any manner, the same order and method, and none other, should be adopted and pursued, for ascertaining his interest and property in the partnership effects, as is marked out in the original articles of partnership, in the two cases of a partner *dying, or withdrawing under his own notice for that purpose; and the same period of time, to wit, seven years from the time of such dissolution, by seven equal yearly instalments bearing interest, should be allowed to the continuing partner, for the liquidation of the retiring partner's share and interest in the partnership property, as it might then happen to be, any thing in the recited articles to the contrary notwithstanding; and the parties, in all other respects not thereby altered, ratified and confirmed all the clauses, provisoes, and agreements, contained in the original articles of co-partnership.

The affidavit also stated, that the agreement of July, 1816, was executed without any fraudulent intention; and that in November, 1817, the defendants, by a written notice, required the plaintiffs to join in a settlement of accounts and valuation, according to the provisions of the articles of partnership, the defendants waiving the benefit of the clause entitling them to a delay of seven years for the payment of the bankrupt's share, and offering payment on the settlement of the accounts; and Ellis deposed, that at the time of the execution of the agreement of July, 1816, he had not committed, or contemplated the commission of, an act of bankruptcy, nor entertained any doubt of his own solvency, or of the solvency of any partnership in which he was engaged.

The affidavit of one of the assignees of Ellis, in support of the motion, stated his belief that the agreement of July, 1816, was executed when Ellis was insolvent, and in contemplation of bankruptcy; and that Ellis in his final examination, did not disclose that deed.

Sir Samuel Romilly, Mr. Bell, and Mr. Horne, in support
of the motion :

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The provision by the second deed of July, 1816, for the event of bankruptcy is void, and the partnership being dissolved by the bankruptcy of Ellis, his assignees are entitled to a sale of the partnership effects, and in the mean time to the appointment of a receiver. The stipulation for transferring the share of the bankrupt to his solvent partners, at a price fixed by valuation, and payable in the course of seven years, is contrary to the policy of the bankrupt laws. * * *

[477]

Mr. Hart and Mr. Shadwell against the motion. * * *

[478]

Sir Samuel Romilly, in reply :

[480]

* * The provisions of this deed are designed for the express purpose of defeating the bankrupt laws ; cases of future payment arising from contract, without reference to bankruptcy, have no analogy to a stipulation for repayment of capital by instalments, provided specifically for that event. The second deed is evidently framed in contemplation of the individual bankruptcy which ensued.

THE LORD CHANCELLOR :

When a partnership expires, whether by the death of the parties, or by effluxion of time, without special provision as to the disposition of the property, in all these cases, to which I may add the bankruptcy of a partner, the partnership is considered, in one sense, as determined, but in a sense also as continued, that is, continued till all the affairs are settled : † and as, *in the ordinary course of trade, if any of the partners seek to exclude another from taking that part in the concern which he is entitled to take, the Court will grant a receiver ; so in the course of winding up the affairs after the determination of the partnership, the Court, if necessary, interposes on the same principle.

[*481]

In this case, the first question is, Whether, supposing the original deed had provided for the dissolution of the partnership by bankruptcy, as it has provided for the dissolution by other

† *Crawshay v. Maule, post, p. 126.*

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means, that provision would be good? I will not say that it would not; but I have heard nothing to convince me that it would. From the original deed, it is clear that the intention of the parties was not, as the defendants insist, to apply the special provision to the event of dissolution by bankruptcy. After providing for other cases, it expressly declares, that in case of bankruptcy, the concerns are to be wound up in the same way as if no special provision was made. On this agreement, the parties proceed *till the execution of another deed, which, in one sense, may be justly said to be made in contemplation of bankruptcy, because it is applicable to the event of bankruptcy alone; but I have no doubt, from the face of it, that it was made, in a strict sense, in contemplation of bankruptcy; for it contains a recital which cannot be believed by any one who looks at the original deed, that the parties to that deed intended the same provision in cases of bankruptcy and insolvency, as in the case of dissolution from other causes. I go farther; the inefficacy of the terms of the agreement as applied to bankruptcy, affords another proof that that application was not designed. In the event of dissolution by misconduct, the parties were to name a valuer, and the property was to be divided; if the partnership was dissolved by the death of a partner, what was to be done? His executors or administrators were to name a valuer. The deed then contemplating bankruptcy and insolvency, the provision for insolvency is sufficient, because, while not yet become a bankrupt, the insolvent retains all capacities of acting; but if he becomes bankrupt, it is impossible to contend that, under this clause, he is to name the persons who are to value the interests of his assignees; and no such authority is given to his assignees, for the word "assigns" is not to be found in the deed.

I have no doubt, therefore, whether, on general principle, or on the construction of the deeds, that the law of this case is, that the partnership was dissolved by bankruptcy; and the property must be divided as in the ordinary event of dissolution without special provision. The consequence is, that the assignees of the bankrupt partner are become, *quoad* his interest, tenants in common with the solvent partner; and the Court must then apply

the principle on which it proceeds in *all cases, where some members of a partnership seek to exclude others from that share to which they are entitled, either in carrying on the concern, or in winding it up, when it becomes necessary to sell the property, with all the advantages relative to goodwill, &c.

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[*483]

With these observations, I shall, for the present, leave the case, considering it one in which some arrangement among the parties is evidently recommended by the interest of all.

The motion being again mentioned, *Mr. Hart* objected that, in the absence of imputation of misconduct, or suspicion of insolvency, the appointment of a receiver was not a measure of necessity for the sale of partnership property.

July 17.

Sir Samuel Romilly insisted, that a division of the stock (to which, on the dissolution of the partnership by the bankruptcy, the assignees were entitled), having become impracticable by the continuance of the trade during two years, and the consequent change of stock, a sale was necessary, and would be best conducted by a receiver, the plaintiffs not objecting to the appointment of the defendant, Greenwood.

THE LORD CHANCELLOR:

The property must be sold. Greenwood may be appointed receiver; and let the Master consider the best mode of sale.

HOOPER v. GOODWIN.†

(1 Swanston, 485—494; S. C. 1 Wilson, 212.)

[In this case the only point of permanent interest consists of the following passage from the judgment of the MASTER OF THE ROLLS, who is reported to have said (at p. 491):]

A gift at law, or in equity, supposes some act to pass the property: in donations *inter vivos*, (not adverting, at present, to

1818.
June 8, 11.
Rolls Court.
PLUMER,
M.R.
[485]
[491]

† *Cochrane v. Moore* (1890) 25 Q. B. D. 57, 72, 59 L. J. Q. B. 377.

HOOPER v. GOODWIN. donations *mortis causa*.) if the subject is capable of delivery, delivery; if a chose in action, a release, or equivalent instrument; in either case, a transfer of the property, is required. An intention to give, is not a gift.

1818.

June 9, 10, 27.
July 11, 23, 31.

ELDON, L.C.

[495]

CRAWSHAY v. MAULE.†

(1 Swanston, 495—530; S. C. 1 Wilson, 181.)

R. C. being in possession of mines and ironworks, held under leases of unequal duration, by his will bequeathed 25,000*l.* to B., “as a capital for him to become a partner with my executor of one-fourth share in the trade of all those works, so long as the lease endures,” with a devise to H. and his wife of the residue of his estates, real and personal; by a codicil the testator gave to W. C. three-eighths of the concern at the ironworks, “so the partnership will stand at my decease, W. C. three-eighths, H. three-eighths, B. two-eighths.” After the testator’s death, W. C., H., and B., carried on the works for two years, selling iron manufactured not only from the produce of their mines, but from ore and old iron purchased for the purpose of manufacture and resale. B. having then assigned his share to C., the business was carried on in like manner by C. and H. till the death of the latter; no agreement having ever been entered into for the duration of the partnership.

1. The codicil withdraws the trade from the operation of the residuary clause in the will, and vests three-eighths in H. to the exclusion of his wife.

2. The concern is not a mere joint interest in land, but a partnership in trade.

3. The purchase of a leasehold interest as part of a stock in trade, is not evidence of an agreement to contract a partnership commensurate with the duration of the lease.

4. The partnership is dissolved by the death of H.

5. In a suit instituted by W. C., praying a sale of the partnership property, the Court, on motion, directed an inquiry whether it would be for the benefit of all parties interested that the works should be sold, or carried on for the purpose of winding up the concern.

By articles of agreement dated the 31st of July, 1794, between Antony Bacon, and Richard Crawshay, Bacon agreed to assign to Crawshay all his interest in certain lands, and mines of coal, and iron ore, situated at Cyfarthfa in the county of Glamorgan, (of which he *was then in possession, under three leases for terms of 99 years each, commencing respectively in the years

[*496]

† *Waterer v. Waterer* (1873) L. R. 12 Ch. D. 813; and see the Partnership Act, 1890, ss. 20—22.—F. P.
15 Eq. 402; *Davies v. James* (1879)

1768, 1765, and 1768) subject, after the 29th of September, 1815, to an annual rent of 5,000*l.* and a payment of 15*s.* a ton on all pig iron, annually made on the premises, beyond 6,400 tons. Richard Crawshay accordingly took possession of the premises, and carried on iron works there: and in 1801, intending an extension of the works, and the erection of new furnaces, it was agreed between him and Bacon, that the payment of 15*s.* a ton beyond 6,400 tons, should cease at 10,700 tons. Disputes having arisen on the subject of that agreement, in 1808, Richard Crawshay filed a bill to compel specific performance. The decree pronounced in March, 1810, directed Bacon to execute to Richard Crawshay an underlease of the premises, for all the times which he, or the trustees under his marriage settlement, had therein, except the last day, subject to the yearly payments stipulated.

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Richard Crawshay being seised and possessed of a considerable real and personal estate, including the iron works at Cyfarthfa, and the buildings and machinery thereon, and a leasehold wharf at Cardiff, used for shipping iron, by his will dated the 26th of September, 1809, after giving among other legacies, 100,000*l.* to his son William Crawshay, gave to Joseph Bailey 25,000*l.* “to be transferred from my account on the ledger to his, intended as a capital for him to become a partner with my executor of one-fourth share in the trade of all those works so long as the lease endures, with the principal and profits therefrom to be his own forever.” He then gave to Benjamin Hall, esq. and his wife, of Abercarne, and to their heirs for ever, all the residue of his estate, real and personal, and appointed Mr. Hall sole executor. By a codicil, dated the 4th of May, 1810, the testator gave to his son William Crawshay, “three-eighth *shares of my concerns at this iron work, and of the premises at Cardiff; so the partnership will stand at my demise, William Crawshay three-eighths, Benjamin Hall three-eighths, Joseph Bailey two-eighths.”

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The testator died on the 27th of June, 1810; Mr. Hall proved his will, and William Crawshay, Hall, and Bailey took possession of the iron works, and carried them on as co-partners in the shares bequeathed to them, under the firm of Crawshay, Hall, and Bailey, but without any articles of co-partnership. In

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October, 1812, William Crawshay purchased the share of Bailey for 80,000*l.*, and from that time the works were conducted by William Crawshay and Hall, till the death of the latter, under the firm of Crawshay and Hall; no written articles of co-partnership were ever executed or prepared between them; but they verbally agreed that the future capital of the concern should be 160,000*l.*, which consisted of an imaginary or estimated value of the whole of the partnership property; (100,000*l.* standing to the credit of William Crawshay, in respect of his five-eighth parts, and 60,000*l.* to the credit of Mr. Hall, in respect of his three-eighth parts); and that the books should be balanced on the 31st of March in each year, and the annual profits drawn out by William Crawshay and Hall, in proportion to their shares.

No under-lease having been executed in the life of Crawshay, by indenture of the 21st of May, 1814, Bacon, and his trustees, in obedience to the decree of 1810, assigned to Hall, his executors, &c. all the premises, for the residue of the respective terms, except the last day of each, subject to the annual rent of 5,000*l.* and the payment of 15*s.* a ton on all pig iron made yearly on the premises above 6,400 tons, and not exceeding 10,700 tons; and by a deed dated the 1st of June, 1814, *and indorsed on the assignment, Hall declared that he would stand possessed of the premises, as to three-eighth parts, in trust for himself, and as to five-eighth parts, in trust for William Crawshay; and Hall and William Crawshay entered into covenants for payment of their respective proportions of rent, and for mutual indemnity.

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By indenture dated the 23rd of May, 1814, Bacon, in consideration of 32,500*l.* paid three-eighths by Hall and five-eighths by William Crawshay, assigned to Joseph Kaye, his executors, &c. in trust for Hall and Crawshay, in the proportion of three-eighths to the former, and five-eighths to the latter, the rent of 15*s.* per ton on iron, then due or to become due. By another indenture of the same date, Bacon, in consideration of 62,500*l.* assigned to Kaye, in trust for William Crawshay, his reversionary interest in the premises, and the annual rent of 5,000*l.*

On the 1st of June, 1814, Bailey, in execution of the agreement of October, 1812, assigned to William Crawshay his share in the partnership property.

On the 31st of July, 1817, Mr. Hall died, leaving four sons (the eldest of the age of fifteen years), and a daughter. By his will, dated the 8th of the same month, he devised to George Maule, John Llewellyn, and Joseph Kaye, all his freehold, copyhold, and leasehold estates, (except trust and mortgage estates, and the estates in which he was interested as a partner with William Crawshay at Cyfarthfa), in trust, subject to the payment of debts and legacies in aid of his personal estate, for the benefit of his children.

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And he authorized his trustees to carry on the business, and to make over the same to his son (if desirous of having the same) at 21, and he appointed his trustees to be executors of his will.]

On the 12th of August, 1817, William Crawshay sent a written notice to the executors of Hall, that he considered the partnership absolutely dissolved by Hall's death, and would not consent to carry on the works in conjunction with his representatives. [500]

The bill in the first cause, filed by William Crawshay against the executors of Mr. Hall, prayed, a declaration that the partnership between the plaintiff and Hall, in the iron works, and all the trade and business thereof, became absolutely dissolved, or determined, by the death of Mr. Hall, or from that period; an account of the *partnership dealings, from the foot of the last settlement thereof, previous to his death, and payment of the balance, (after satisfaction of the partnership debts) between the plaintiff and the executors of Mr. Hall, according to their respective interests; a sale of all the partnership effects, and a division of the proceeds. [*501]

The defendants, the executors of Hall, admitted that no written articles were ever entered into between William Crawshay and Hall, any such articles, as they believed, being considered unnecessary, inasmuch as the proportions to which the parties were entitled in the leasehold premises, and the leases, sufficiently ascertained their rights and interests as long as the leases endured. They denied that by the death of Hall, his interest in the premises and iron-works determined or was in any respect affected, submitting that they were entitled to the premises and

CRAWSHAY iron-works, as tenants in common with William Crawshay, for
 v. the residue of the terms of years for which they were holden.
 MAULE and to carry on iron-works for the benefit of the family of Hall, in the same manner as he carried on the same with William Crawshay, and according to the directions of his will, until one of his sons should attain the age of twenty-one years. They stated that the iron-works were absolutely necessary to the beneficial enjoyment of the leasehold premises; and they insisted, that it appeared from his will and codicil to be the intention of Richard Crawshay, that his legatees should, for themselves and their representatives and families respectively, have an interest in the leasehold premises and iron-works, commensurate with the terms for which they were holden; that the joint interest which William Crawshay and Hall had therein, was not an interest in an ordinary trading partnership, but an interest given by Richard Crawshay to them, for the benefit of themselves and their respective families, commensurate *with the terms of years for which the leasehold premises were holden; and that therefore no sale of the property ought to be directed by the Court in opposition to the bequest of Richard Crawshay, and to the will of Hall, whose family would in that event be deprived of the benefits intended and contemplated by him, to be derived from the leasehold premises and iron-works.

[*502]

The bill in the second cause, filed by the executors and the children of Mr. Hall against William Crawshay, prayed, a declaration that the executors were entitled to the leasehold premises and iron-works, for three-eighth parts thereof, as tenants in common with William Crawshay, (who was entitled to the other five-eighth parts), until one of the sons of Hall should attain the age of twenty-one years, and to carry on the iron-works with William Crawshay, for the benefit of the family of Hall, in the same manner as Hall carried on the same, and according to the directions of his will, until one of his sons should attain the age of twenty-one years, and that then such son, if he chose, would be entitled to the said leasehold premises and iron-works, for three-eighth parts thereof, as tenant in common with William Crawshay, for the remainder of the said terms of years, and to carry on the iron-works with William

Crawshay accordingly. The bill also prayed, the consequential accounts and directions.

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June 9.

On this day a motion was made in behalf of William Crawshay, that it might be referred to the Master, to consider and approve a proper plan for the sale and disposal of the whole of the co-partnership iron-works, property, estate, and effects, including the good-will of the joint trade, and that the Master might proceed to a sale thereof immediately.

*Sir Samuel Romilly, Mr. Bell, Mr. Horne, and Mr. Rigby, in support of the motion [cited *Crawshay v. Collins*,† *Waters v. Taylor*,‡ *Forman v. Homfray*,§ and *Featherstonhaugh v. Fenwick* ||].*

[503]

Sir Arthur Pigcott, Mr. Hart, and Mr. Winthrop, against the motion :

* * First, this is a case, not of partnership in trade, but of joint interest in land; each party may apply for a partition, or sell his own share, but cannot compel a sale of the whole. The manufacture of the produce was merely a mode of enjoyment of the land; not a trade. Next, the leases taken during long terms of years, for the purposes of the partnership, amount, in the absence of express agreement on that subject, to evidence of an intention to continue the partnership during the continuance of the leases. Lastly, it was the manifest intention of the late Mr. Crawshay, in the provisions of his will, that the duration of the partnership should be commensurate with the duration of the leases. The legacy of 25,000*l.* to Mr. Bailey is given expressly as a capital for him to become a partner “so long as the lease endures.”

[504]

* * * * *

*Sir Samuel Romilly, in reply. * * **

June 10.

THE LORD CHANCELLOR :

[505]

After making some observations upon a question of practice which had been raised, said :]

[506]

† 10 R. R. 61 (15 Ves. 218).

§ 13 R. R. 115 (2 Ves. & B. 329).

‡ 13 R. R. 91 (15 Ves. 10).

|| 11 R. R. 77 (17 Ves. 298).

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The general rules of partnership are well settled. Where no term is expressly limited for its duration, and there is nothing in the contract to fix it, the partnership may be terminated at a moment's notice by either party. By that notice the partnership is dissolved, to this extent, that the Court will compel the parties to act as partners, in a partnership existing only for the purpose of winding up the affairs. So death terminates a partnership, and notice is no more than notice of the fact that death has terminated it. Without doubt, in the absence of express, there may be an implied, contract, as to the duration of a partnership; but I must contradict all authority, if I say that wherever there is a partnership, the purchase of a leasehold interest of longer or shorter duration, is a circumstance from which it is to be inferred that the partnership shall continue as long as the lease. On that argument, the Court holding, that a lease for seven years is proof of partnership for seven years, and a lease of fourteen of a partnership for fourteen years, must hold, that if the partners purchase a fee simple, there shall be a partnership for ever. It has been repeatedly decided, that interests in lands purchased for the purpose of carrying on trade, are no more than stock in trade. * * *

[518]

It seems difficult to establish that this is an interest in land, distinct from a partnership in trade; a mere interest in land, in which a partition could take place; for when persons, having purchased such an interest, manufacture and bring to market the produce of the land, as one common fund, to be sold for their common benefit, it may be contended that they have entered into an agreement, which gives to that interest the nature, and subjects it to the doctrines, of a partnership in trade. Such is my present view; but both on the merits and on the objections of form, the case deserves farther consideration.

June 27.

THE LORD CHANCELLOR:

[*519]

It may be assumed, though the observation is not material to the purposes of this application, that the desire *of Mr. Crawshay, the testator, was to keep the concern together. He gives the sum of 25,000*l.* to Mr. Bailey, as a capital for him to become a partner with his executor, Mr. Hall; the rest of his interest in

the trade, if he had not made a codicil, would have passed by the will to Hall and his wife; the effect of the will and codicil combined, is this; by the former, the testator being possessed of the entire concern, bequeathed two-eighths to Bailey, the rest, including the three-eighths given by the codicil to William Crawshay, would have devolved under the residuary clause to Hall and his wife; the codicil, continuing the gift of two-eighths to Bailey, disposes of three-eighths to William Crawshay, and of the remaining three-eighths to Hall, in exclusion, as I understand, of his wife. Such being the state of the concern at the death of the testator, it appears that Bailey sold his share to William Crawshay, and it has not been disputed in the course of the discussion, that every one of the legatees was at liberty to sell his interest; the consequence is, that the individuals forming the partnership may be changed as often as the partners think proper. The question on these pleadings is, whether, supposing this the hearing of the cause, the Court could order the property to be sold; and whether the nature of the concern, and of the interest of the several parties in it is not such, that each being at liberty to sell his own share, they yet cannot, more particularly by interlocutory application, call on the Court for a sale of the whole? Mr. Crawshay, having bought the interest of Mr. Bailey, carried on the business jointly with Mr. Hall, till the death of the latter. His will seems to me to devolve on his executors the discretion of continuing or discontinuing this concern, as they should think most for the benefit of his family; and he considers himself at liberty (for the will states as much) to introduce three executors as partners with Mr. Crawshay, and various *branches of his family as *cestuis que trust* of those executors, as they must be, if the partnership is continued. It is impossible to contend that Mr. Hall may thus impose on Mr. Crawshay, the necessity of continuing in partnership with his three executors, and their *cestuis que trust*, without admitting that on the same principle, he might have imposed the obligation of receiving as partner, any person who might now sustain, or hereafter acquire, the character of executor or administrator to any of the trustees, or of their *cestuis que trust*, and that Mr. Crawshay might have exercised a similar power. If this case is

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CRAWSHAY v. MAULE. to be considered subject to the principles which govern partnerships in general, I cannot say that such was the situation of either party.

On the death of Mr. Hall, there being no articles of partnership, or agreement for its continuance, without any notice, and for every purpose, except that of winding up the concern, the partnership would cease, unless the surviving partner, and the representatives of the deceased, entered into some agreement for its continuance; and in the absence of articles, or stipulation to the contrary, Crawshay, in the life of Hall, or Hall, in the life of Crawshay, might, on the common principles of the contract, by notice, have terminated the partnership. It is contended, that the late Mr. Crawshay having formed this business, must have had an intention to keep it together, as one concern, though he distributed different interests in it among different members of his family; had he so said, without doubt, those who took his bounty, must have taken it on the terms which he imposed; but there is no such expression in his will or codicil, nor is the effect of those instruments more than to give an interest in aliquot shares and proportions in this concern. He has said, indeed, that Bailey should have an interest to the amount of 25,000*l.*, and should *be partner with his executor; but neither the terms nor the intent of the will impose on Bailey, or on his executor, an obligation to carry on the partnership, except as between themselves; and if Bailey thought proper to sell to Crawshay his interest, a question might have arisen, as long as the executor was living, whether Crawshay, purchasing the interest of Bailey, did not purchase subject to the obligation which, it is said, this will imposes on Bailey; but it seems to me impossible to contend, that when the executor was dead, either Crawshay or Bailey were bound to carry on the trade with the executors of that executor; a proposition which cannot be maintained without asserting that they were bound to carry on the trade with the successive executors of that executor, to the expiration of the leases.

It has also been insisted that the purchase of leases must be considered as evidence of a contract for the continuance of the concern. Unquestionably partners may so purchase leasehold

interests as to imply an agreement to continue the partnership as long as the leases endure ; but it is equally certain that there is no general rule, that partners purchasing a leasehold interest must be understood to have entered into a contract of partnership commensurate with the duration of the leases. For ordinary purposes a lease is no more than stock in trade, and as part of the stock may be sold ; nor would it be material that the estate purchased by a partnership was freehold, if intended only as an article of stock ; though, a question might in that case arise on the death of a partner, whether it would pass as real estate, or as stock, personal estate in enjoyment, though freehold in nature and quality.† It is impossible therefore in *my opinion to hold, that there being many leases, some long, some of short duration, and others intermediate, the partnership is to subsist during the term of the leases, or of the longest lease. By the will of Mr. Hall, the question, whether his executors and trustees should continue in partnership, is left to their discretion ; clear evidence of his opinion, that his interest might be separated from Crawshay's ; if so, Crawshay's might be separated from his ; and upon that construction of the will of the late Mr. Crawshay, the argument is, that he meant the whole concern to be kept together, but cared not who were to be the partners ; an intention not to be imputed to him unless unequivocally expressed in the words of his will.

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C.
MAULE.

[*522]

The question then resolves itself into this, what is the nature of this partnership property ? The general doctrine with respect to a trading partnership is, that where there is no agreement for its continuance, any one of the partners may terminate it, and admitting the serious inconveniences which sometimes ensue, it becomes us to recollect the formidable evils which would attend the opposite doctrine ; nor is it clear that a better rule could be suggested : but, whatever is its policy, the principle of law being established, it is incumbent on those who engage in partnership to protect themselves by contract against its inconveniences ; if they omit that precaution, Courts of Justice have no right to redeem them from the penalties of their imprudence. With respect to mere joint-interests in land, I apprehend the rule to be different

† See *Steward v. Blakeway* (1869) L. R. 4 Ch. 603.

CRAWSHAY v. MAULE. [*523] the parties then becoming tenants in common, each cannot call on his companions to concur *in a sale, but must sell his own interest. It is said that this is only the case of tenancy in common of a mine ; if so, I think that the doctrine with respect to land would apply, and not the doctrine with respect to trading partnerships ; but a very difficult question may arise whether, if the parties, being originally tenants in common of a mine, agree to become jointly interested in the manufacture of its produce for the purpose of sale, they continue mere tenants in common of the mine ; still more, if not only carrying the produce of their own mine to market, they become purchasers of other property of a like nature, to be manufactured with their own. On such a case in bankruptcy, it might be a question whether they were purchasers for the mere purpose of better bringing to market the produce of their own mine, or for the purpose also of bringing a distinct subject to market as traders. On the evidence before me the case is left somewhat doubtful, though, I think, that the language of Mr. Hall's will, and of all the instruments, describes this as a trading concern ; but under the circumstances it will not be wrong to have the nature of the business explained by affidavit. If this is a trading partnership the common principles must be applied.

Then comes the question, Can the Court, in such a case, direct a sale by interlocutory order on motion ? I have considered that question much, and I think that the Court not only can, but in many instances does, order a sale on motion, in the instance of a trading partnership actually dissolved. Consider the inconveniences of a contrary proceeding. By the hypothesis, the Court has before it the case of a trading partnership clearly dissolved, and nothing remains, therefore, but to wind up the concern ; we must then weigh the consequences of permitting the business of a partnership, *actually dissolved, to proceed until a decree for a sale ; a decree which, in those circumstances, must necessarily be pronounced. An universal rule, that the trade, whether beneficial or not, should be carried on till the decree, would render the jurisdiction of the Court, in many cases, extremely mischievous ; and on general principles, therefore, it is the practice, in the instance of a trading partnership clearly

dissolved, at once to put an end to the trade, where that measure is required by the evident interest of the parties.

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I shall reserve my final decision till I have seen the affidavit; and it may be worth consideration, whether you will not, in the mean time, bring before the Court, the posthumous child of Mr. Hall.

The affidavit of Mr. Crawshay, in explanation of the nature of the business, was to the following effect; that the iron-works at Cyfarthfa had, from the period of their first establishment by his father, been conducted as a trading concern; that the produce of the mines consisted of iron-stone, coal, and lime-stone; and that, at the works, large quantities of iron (of various specified descriptions) had been, and were manufactured, sometimes from the materials obtained from the leasehold premises in question, and sometimes from pig-iron and finers' metal purchased in London, Plymouth, and Bristol; that from the establishment of the works, the proprietors had been in the habit of making very considerable purchases of iron-ore from Lancashire, pig-iron, and finers' metal, and of old wrought iron, naval and ordnance stores, for the purpose of manufacturing the same at the works into various sorts of iron, and re-selling them in that manufactured state; that such purchases, (to a large amount), manufacture, and re-sale, had been made by *the successive firms of Crawshay, Hall, and Bailey, and Crawshay and Hall, during those respective partnerships; that the whole of such purchases were made with a view to profit, by manufacturing the same at the works, into bar and other iron for re-sale, and not merely for mixing the same with the iron the produce of the works, for the purpose of improving the iron of the works, or bringing the same better to market; and that from the first establishment of the works, the iron-stone, coal, and lime-stone produced from the mines on the works, had never been sold in their natural or raw state, except a small quantity of coal for the accommodation of the labourers.

[*525]

THE LORD CHANCELLOR :

July 31.

* * After repeated consideration, I entertain no doubt,

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CRAWSHAY either that if this is to be regarded as a trading concern, the
 v.
MAULE. partnership was ended by Hall's death or that it was a trading
 concern; the consequence is, that being a trading concern, and
 the partnership being terminated by Hall's death, Crawshay
 would be justified in dealing with the property, since that event,
 [*529] as a person who is to wind up the concern. *That introduces
 the question, whether I am to place a manager on the estate, or
 to leave Crawshay to deal with the property as surviving
 partner? In that character he is at liberty to deal with it for
 the purpose of winding up the concern; it is true that other
 parties are at liberty to deal with it in the same way, and in the
 event of differences between them, the Court can only appoint a
 manager to act under its direction. If application was made for
 a manager, it would be the duty of the Court, with regard to the
 infants, to consider whether that appointment is for their
 benefit, or whether there should be a reference to inquire the
 expediency of appointing a manager to wind up the business, or
 ordering a sale. The state of the market varies so much, that a
 sale, which might be beneficial at one moment and prejudicial at
 another, cannot be ordered without inquiry. I think that I
 shall not do wrong in directing a reference to the Master of the
 vacation to inquire whether it is for the advantage of all parties
 that this property should be sold, and, if so, on what terms;
 without prejudice to any question.

* * * * *

[530] By his report, dated 11th December, 1818, the Master, after
 stating that it was admitted that it would be highly injurious to
 all parties interested, to stop the works, or to carry them on
 merely for the purpose of winding up the concern, or to put them
 up to sale otherwise than as going works, and that William
 Crawshay had offered to purchase the whole of Mr. Hall's share
 for 90,000*l.*, certified that it would be for the benefit of the
 infants, and of all other parties concerned in the works, that the
 whole of the shares and interests in the said leasehold and other
 estates, &c. vested in the executors of Mr. Hall, should be sold
 to Mr. Crawshay at that price. By an order of the VICE-CHAN-
 CELLOR, on the petition of Mr. Crawshay, the report was con-

firmed, and it was "ordered that the defendants, G. Maule, J. Llewellyn, and J. Kaye, as executors of the said B. Hall, esq., the testator in the pleadings named, be at liberty to sell and dispose of, to the petitioner, by private contract, at the sum of 90,000*l.*, ascertained and apportioned as in the said report specified, all the estate, shares, right, and interest of them the said defendants, as such executors as aforesaid, of and in the said iron works, and the said late co-partnership of Crawshay and Hall, and in the leases, farms, lands, and buildings, wharf, machinery, &c."†

CRAWSHAY
v.
MAULE.

BARKSDALE v. GILLIAT.‡

(1 Swanston, 562—566.)

1818.
May 21.

ELDON, L.C
[562]

A testator having directed legacies to be paid at the expiration of six months after his decease, without deduction, the legatees are entitled to the full amount, and the legacy duty must be paid by the executors.

Circumstances in which the Court is competent, for the construction of a will, to examine the amount of the testator's estate.

By his will, dated the 20th of December, 1814, Thomas Dent bequeathed, among other pecuniary legacies, 500*l.* to the plaintiff. The will contained the following clause: "I desire my executors to make payment of all the legacies, including the charitable donations or legacies, without any deduction, as given and bequeathed in this my will, at the expiration of six months from the time of my decease, or sooner if convenient: and I desire they will make sale of my property, my fifty-four shares in the Commercial Docks, my forty shares in the East London Waterworks, and all the shares I have or may have in the Banks of Virginia, and likewise my stock or property in the British funds, and all other property I have or may hereafter possess, for that purpose. A list of all my property at this time, or rather a statement of the presumed amount of the *same, is left with this will, being about 40,000*l.* sterling. I do hereby direct that my said executors shall make payment of my debts, if any, my funeral expenses, stamp duty, and charges of proving

[*568]

† 24th December, 1818, Reg. Lib.
A. 1818, fol. 204.

‡ *In re Coles' will* (1869) L. R. 8
Eq. 271.

BARKSDALE
GILLIAT.

this my will, and all other charges or expenses whatsoever, out of the surplus which may remain, or residue of my effects."

With the testator's will was enclosed a writing, dated 21st of December, 1814, in these words: "Private remarks relative to my will. My property, by an estimate, I have made out and left with my private papers, exclusive of interest and dividends, which may be received, will be about 40,000*l.* or 41,000*l.*; the different sums left in my will amount to 36,700*l.* sterling. When the Commercial Dock shares, the East London Water-works shares, the Virginia Bank stock, and my property in the British funds are sold, my executors will be enabled to pay the legacies and donations within the time stated, and have a surplus of about 3,000*l.* Out of this surplus sum is to be paid my debts, (if any,) the stamp-duty, and expense of proving my will, funeral and all other expenses. T. C. and Co.'s note for 3,000*l.* can be paid to T. C. as his legacy. In addition to the surplus above stated, are debts due to me in Virginia, North Carolina, &c. G. J. of Petersburg, Virginia, is agent, having the books, bonds, and accounts, and acting under a power of attorney. The presumed value of these debts is 4,000 dollars. The residue of my effects, when all the payments are made, and all the claims are paid, is to be equally divided among my executors."

[*564] Soon after the death of the testator, one of the executors proved the will, together with the testamentary paper. After payment of the testator's debts, a surplus remained more than sufficient to satisfy all his legacies *and bequests, his property having been considerably augmented since the date of the will, by the rise of the public funds of this country.

The bill filed against the executors prayed payment of the legacy of 500*l.*, without deduction. The defendants insisted on deducting the legacy duty.

On this day the plaintiff moved, that the defendants might be ordered to pay the legacy without deduction.

Mr. Bell and *Mr. Roupel*, in support of the motion, relied on the terms "without deduction," which, if the executors were allowed to deduct the legacy-duty, would become nugatory.

Sir Samuel Romilly and Mr. Clason, against the motion :

BARKSDALE
v.
GILLIAT.

The legacy duty, although for the prevention of fraud the Legislature has required it to be paid by the executor, is not a deduction from the legacy, but a charge upon the legatee after payment of the legacy. The testator has specified the charges which he meant his executors to defray, the stamp-duty, and expenses of proving his will. If the executors are to pay the legacy-duty, in addition to the legacy, the amount of the testator's estate at his death would not be sufficient to pay all the legacies ; and the additional sum will itself be subject to duty, the payment not being expressly directed in terms required for the purpose of exemption, by stat. 36 Geo. III. c. 52, § 21.

THE LORD CHANCELLOR :

It seems admitted, that unless some qualified construction can be put on the words "without deduction," *the will ought to be construed as directing payment of the legacies without deduction of the legacy-duty, as between the pecuniary and residuary legatees. It is contended, first, that the legacies being payable at the end of six months, the words "without deduction" mean payment of the full amount, without any allowance on account of payment before the expiration of the usual period, a year : that the executors were to pay, at the earlier period assigned, as much as would otherwise have been payable at the ordinary time. The difficulty of that argument consists in this, that the same construction must have been adopted, if the will had not contained the words "without deduction ;" because, with or without those words, a duty is imposed on the executors of making payment at the end of six months, or sooner, if the funds could be conveniently applied. It struck me, that the legatees living in distant parts, some in Philadelphia, &c., the meaning of the testator might be, that their legacies should be paid without any charge in respect of the difficulty of making payment among individuals so resident ; on reconsideration, I think that argument rests too much on conjecture.

[*365]

The case amounts to this : the testator, shewing that he is estimating the amount of his property, and its adequacy to the payments which he directs, the Court is competent to examine

BARKSDALE the proportion of that property to those demands. Calculations
GILLIAT. of property are clearly evidence in a case in which the testator
 has stated on his will, how, as he imagines, his property will
 stand, after the dispositions which he has made; and if, by the
 testamentary paper annexed to his will, he had shewn that the
 funds would not be sufficient to pay the legacies and the legacy-
 duty, the legacies must be paid, charging the duty. As far,
 however, as I am master of figures, I cannot discover that; and,
 [*566] therefore, though *I have a suspicion that the testator intended
 that the legacy-duty should be deducted, my opinion, subject to
 considerable doubt, is, that these legacies must be paid without
 deduction of the legacy-duty.

1818.

June 12.
 July 8, 15.

Rolls Court.

PLUMER,
M.R.

[566]

SKRYMSHER v. NORTHCOTE.†

(1 Swanston, 566—573; S. C. 1 Wilson, 248.)

A testator having, by his will, directed his executors to transfer 500*l.*, part of his residuary estate, to H. N., and made a specific disposition of the other parts, and having afterwards drawn a pen through the name of H. N., and by a codicil declared that he razed her name cut of his will with his own hand; the 500*l.* belong, as undisposed of, to his next of kin.

By his will, dated the 19th of June, 1794, Simeon Coley, after a direction for the payment of his debts and some pecuniary legacies, (including 10*l.* to each of his executors for their trouble in executing the trusts of his will,) bequeathed to trustees all the residue of his estate and effects, upon trust to sell and convert into money such parts as should not consist of money, and invest the same, together with all the rest of his estate and effects not already invested in the funds, in the purchase of 5 per cent. Bank annuities, and to stand possessed of all his said estate and effects, and of the funds and securities for the same, upon trust to pay the dividends and annual produce between his two daughters, Elizabeth Amelia Coley and Helen Coley, in equal proportions for their separate use, during their respective lives, and after the respective deceases of his said daughters as to their respective half parts, in trust for all and

† *In re Palmer, Palmer v. Answorth*, '93, 3 Ch. 369, 2 R. 619, 62 L. J. Ch. 988.

every their children, who being sons, should attain twenty-one, or being daughters, should attain twenty-one or be married. The will then proceeded thus: "And in case of and after the death of either of my said daughters, Elizabeth and Helen Coley, without leaving any issue entitled, or who shall live to become entitled, to the half part or share of her so dying, then as to the *half part or share of her whose issue shall so fail, upon trust to pay or transfer 800*l.* 5 per cent. Bank annuities, part of such moiety, unto my son Simeon Coley, his executors and administrators, and upon trust to pay or transfer 500*l.* like annuities, other part of such moiety, unto my 'daughter Hannah Northcote, wife of Thomas Northcote, of Piety Street,' † in the parish of St. James, Clerkenwell, in the county of Middlesex, goldsmith, her executors and administrators, and upon trust to pay and apply the interest, dividends, and annual produce of the remaining part of such last-mentioned moiety," for the separate use of the survivor of his two daughters during her life, in the same manner as her original moiety; and after the death of the survivor, the remainder of the moiety of his daughter first dying without issue, and the original moiety of the survivor, to be in trust for the children of the survivor, in the same manner as their mother's original moiety; and in case of, and after the decease of the survivor of his daughters Elizabeth and Helen, without leaving any issue who should live to become entitled to the said trust monies, he bequeathed one moiety of all the residue of the trust monies to his son Simeon Coley, his executors, &c. absolutely, and the other moiety "unto my said daughter Hannah Northcote," † her executors, &c. absolutely. The testator then appointed John Swertner, and his son Simeon Coley, joint executors.

SKRYMSHER
NORTHCOTE.

[*567]

A codicil, executed by the testator on the 7th of June, 1798, contained the following clause: "I razed the name of Northcote out of my will with my own hand. S. Coley."

On the 22nd of June, 1798, the testator died, leaving a son, Simeon Coley, and three daughters, Hannah Northcote, Elizabeth Amelia Coley, and Helen Coley, his next of kin. Helen Coley

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† In the original will, a pen had been drawn through the words printed between inverted commas.

SKRYMSHER died on the 3rd of August, 1815, unmarried, having attained
v.
NORTHCOTE. twenty-one. By her will, dated the 29th of July preceding, she gave the whole of her property to her sister Elizabeth Amelia Burrow, (formerly Coley,) without naming any executor. On the 18th of January, 1811, Simeon Coley, the son, died, having by his will, dated the 13th of March, 1808, given all sums of money and other property to which, at the time of his decease, he should be entitled under the will of his father, and the stocks, funds, and securities, in which such sums of money and other property should be then invested, to Christian Ignatius Latrobe, John Lewis Wollin, and John Clarke, in trust for his two daughters, Frances Elizabeth, (afterwards married to John Skrymsher), and Ann Amelia, (afterwards married to William Croft Fish,) equally, to be vested at their respective ages of twenty-one years.

The bill filed by Skrymsher and Fish, and their respective wives, against the trustees named in the will of Simeon Coley, the younger, Hannah Northcote, and Elizabeth Amelia Burrow, prayed a declaration of the rights of the parties claiming under the wills of the father and the son. The question argued at the hearing was, who were entitled to the sum of 500*l.* five per cent. Bank annuities, part of Helen Coley's moiety of the residuary estate of her father, given in the event of her death without issue, to Hannah Northcote, whose name the testator afterwards erased.

[*569]

Mr. Trower and Mr. Maddock for the plaintiffs, *Mr. *Hart* and *Mr. Hone* for Hannah Northcote, and *Mr. Bell* for the executors of the son :

* * A specific or pecuniary legacy being revoked, or, from whatever cause, failing, becomes a part of the residue for the benefit of the residuary legatee ; but if a gift of some portion of the residue itself fails, the residue being given as in this instance, in distinct shares, the share so failing will not accrue to the remaining shares, but belongs as undisposed of to the next of kin. *Bagwell v. Dry*,† *Page v. Page*,‡ *Leake v. Robinson*.§ * * *

† 1 P. Wms. 700.

§ 16 R. R. 168, 184 (2 Mer. 363.

‡ 2 P. Wms. 489; Str. 820; Mos. 42. See p. 392).

Mr. Parker for *Mrs. Burrow* :

SKRYMSHER
v.
NORTHCOTE.

[570]

The testator having erased the name of *Hannah Northcote* from his will, and by his codicil recognised the erasure, denoted an intention wholly to revoke and annul the gift to her. The will, therefore, must be read as if that clause had never been inserted in it. No reason is assigned for imputing to the testator the design to die intestate as to this stock. The will and codicil stand as if the bequest, which is revoked, had never been expressed ; and under the will so framed *Mrs. Burrow*, in addition to her share of the capital of the 500*l.* stock, as one of the testator's next of kin, and as the executrix of *Helen Coley*, is entitled to the dividends of the stock during her life.

THE MASTER OF THE ROLLS :

The question with respect to the sum of 500*l.* Bank annuities, given by the will of *Simeon Coley* the father, is, whether the rule applicable to residue is different from that which prevails in the case of every other legacy ? It seems clear on the authorities, that a part of the residue of which the disposition fails, will not accrue in augmentation of the remaining parts, as a residue of residue ; but instead of resuming the nature of residue, devolves as undisposed of. Residue means all of which no effectual disposition is made by the will, other than the residuary clause ; but when the disposition of the residue itself fails, to the extent to which it fails, the *will is inoperative. In the instance of a residue given in moieties, to hold that one moiety lapsing should accrue to the other, would be to hold that a gift of a moiety of the residue shall eventually carry the whole. Whatever argument applies to the entirety of the moiety applies to every part of it ; the distinction is mere sub-division. In this case the testator, in the event of one daughter dying without children, instead of disposing of her moiety of the residue entirely, divides it, and gives 500*l.* to his daughter *Hannah* : she ceasing to be an object of his bounty, he substitutes no other person. Of that sum, therefore, which once formed a portion of the residue disposed of, in the actual event, no disposition is made, and the testator is as to that intestate.

[*571]

* * * * *

1818.
May 21.

ELDON, L.C.

[573]

GRESLEY *v.* ADDERLEY.

GRESLEY *v.* HEATHCOTE.

(1 Swanston, 573—579.)

A mortgagee of a term created for raising portions, and expired, is not entitled to an account of rents and profits in the hands of a receiver, accrued before the expiration of the term.

The appointment of a receiver is for the benefit of incumbrancers only so far as expressed to be for their benefit, and as they choose to avail themselves of it.

A mortgagee of a term is not entitled to a retrospective account of rents and profits.

[*574]

By indentures of lease and release, dated the 20th and 21st of July, 1697, Sir Thomas Gresley, Bart. and Frances his wife, and William Gresley, his son and heir apparent, conveyed to trustees certain estates in the county of Derby, as to part, to the use of William Gresley for life; remainder to the use of Barbara his wife, for life, in lieu of dower; and as to the rest, to the *use of Sir Thomas Gresley for life; remainder as to part, to the use of Frances Gresley for life, in lieu of dower; remainder as to the rest, from the death of Sir Thomas Gresley, to the use of Gilbert Thacker and Thomas Skeffington, their executors, &c. for the term of one hundred years; remainder as to the part limited to Frances Gresley for life, from her death, to the use of Thacker and Skeffington for the like term of one hundred years; remainder to William Gresley for life; remainder to trustees to preserve contingent remainders; remainder to his first and other sons in tail-male, with ulterior remainders, and the ultimate remainder to the heirs of Sir Thomas Gresley. The trusts of the terms of one hundred years were declared to be for raising 3,000*l.* for the portions of the three daughters of Sir Thomas Gresley, and, in certain events, 4,000*l.* for the younger children of William Gresley; with a proviso, that in case any of the persons entitled to the inheritance should pay the sums so to be charged, the terms should remain a security for reimbursing them, with interest from the decease of the person making the payment.

The first term commenced on the death of Sir Thomas Gresley

in 1699; and the second, on the death of Frances Gresley, in July, 1711.

Sir William Gresley died in 1711, leaving Thomas Gresley his only son, and Bridget (afterwards the wife of Adam Otley) his only daughter, the latter of whom became entitled to have the sum of 4,000*l.* raised by sale or mortgage of the estates comprised in the terms.

By indenture of assignment and mortgage, dated the 5th of October, 1719, Elizabeth Thacker, the representative of the surviving trustee, in consideration of 3,000*l.* paid to Otley and his wife by Arabella Marrow, *and 1,000*l.* paid to them by John Browne, assigned the premises comprised in the terms to R. Wilmot, his executors, &c. in trust for Marrow and Browne, subject to redemption.

In 1746, Sir Thomas Gresley, the son of Sir William, died; and, in 1753, Sir Thomas Gresley, his son, also died, leaving Wilmot Gresley his only child, who thereupon became entitled to the fee-simple of the estates, subject to the mortgage debt of 4,000*l.*

In 1776 on the marriage of Wilmot Gresley with Nigel Bowyer Gresley, by indentures dated the 16th and 17th of January, certain estates, including those comprised in the terms, were conveyed (subject to a term of 1,000 years, for raising a sum not exceeding 14,000*l.*, according to the appointment of Wilmot Gresley) to the use of Sir Nigel Bowyer Gresley for life, with remainder to trustees to preserve contingent remainders; remainder to the first and other sons of the marriage, in tail-male; remainder to the use of such persons as Wilmot Gresley should appoint.

Wilmot Gresley died in 1790, leaving no son, and having by her will and codicil made a provision for her daughters, and limited the estates, after the decease of Sir Nigel, to the use of his first and other sons in tail-male, with ulterior remainders.

Letters of administration with the will and codicil annexed, were granted to Sir Nigel, who continued in possession of the estates as tenant for life, subject to the mortgage debt for 4,000*l.*, and the sums which Wilmot Gresley had directed to be raised. By his second marriage Sir Nigel had issue Roger, his eldest son.

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v.
ADDERLEY.

GRESLEY
v.
HEATHCOTE.

[*575]

GRESLEY The second term of 100 years, which commenced in 1711,
 v. having become vested in the Earl of Buckinghamshire, John
 ADDERLEY. Sullivan, and George Davis, as trustees for Edward Desbrowe, on
 GRESLEY their application for payment of the sum of 4,000*l.*, Sir Nigel
 v. executed a bond, payable by instalments, and paid 3,600*l.*, leaving
 HEATHCOTE. 400*l.* unpaid at his death, on the 26th of March, 1808.
 [576]

By his will, dated the 18th of February, 1808, he gave all his real and personal estate to his executors, Sir John Heathcote, William Gresley, Edward Sneyd, and Theophilus Levett, for the benefit of his three daughters.

Three of the executors proved the will, and paid the remaining instalment of 400*l.* and all interest due on the mortgage, and took an assignment of the term by indenture of the 20th of August, 1808.

The first suit was instituted by the infant Sir Roger Gresley, against one of the trustees appointed by Wilmot Gresley, to raise a sum for her daughters, (the trustee having, on the death of Sir Nigel, taken possession of the estates,) for the appointment of a guardian, and maintenance, and a receiver.† To the second cause the executors of Sir Nigel, and the persons interested in the estates, were defendants.

By an order in the first cause, dated the 3rd of June, 1808, it was referred to the Master to appoint a receiver of the rents and profits of the real estates of Sir Roger Gresley, including the estates comprised in the term of 100 years; Sir John Heathcote was afterwards appointed, and the rents and profits received by him were paid into Court. The decree pronounced on the *25th of June, 1808, directed a reference to the Master for the appointment of guardians, and allowance of maintenance to the plaintiff, and an inquiry to what charges and incumbrances the estates were subject, and what was due in respect of them, and ordered the receiver to keep down the interest of the incumbrances affecting the estates.†

[*577]

On the 28th of September, 1809, Sneyd and Levett, two of the executors of Sir Nigel Gresley (no previous measures having been taken by them to obtain possession of the estates, or the receipt of the rents and profits by virtue of the term, or to

† Reg. Lib. A. 1817, fol. 1515.

establish a charge under the decree), and his two surviving daughters and their husbands, filed a bill against Sir Roger Gresley, as tenant in tail of the estates, and against the trustees and incumbrancers, for an account and payment of what was due to Sir Nigel's executors in respect of the sum of 4,000*l*.

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GRESLEY
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By an order dated the 29th of June, 1813, made in both the causes of *Gresley v. Adderley*, and *Gresley v. Heathcote*, proceedings in the second cause were stayed.

On the 1st of December, 1817, the cause of *Sneyd v. Gresley* was heard at the Rolls, and the bill was dismissed,† on the ground that the term had expired.

On this day Sir John Heathcote, Sneyd, and Levett, moved, in both the former causes, for liberty to go in before the Master, and make proof of what was due to them, as executors of Sir Nigel Gresley, under the indentures of the 20th and 21st days of July, 1697, and that the Master might take an account of the rents and profits of the premises comprised in the term mentioned *in those indentures, which had come to the hands of the receiver from the time of his appointment to the expiration of the term, or which accrued during that period.

[*578]

Mr. Hart and Mr. Dowdeswell for the motion :

The question is, whether the persons entitled to the money secured by the term are to lose the benefit of that security. The rents accruing during the term are received for the use of the termor. The suit instituted for rendering the security available, in consequence of delays occasioned by deaths of parties, was not heard till after the expiration of the term, and as there could be no foreclosure of a term expired, the bill was dismissed. The Court will not refuse that relief which would have been given, if the money had not been secured by a term. No report has yet been made of debts and incumbrances ; the executors are entitled to a report as incumbrancers.

Sir Samuel Romilly and Mr. Joseph Martin against the motion :

The amount claimed was a debt of the estate, and can be

† Reg. Lib. P. 1817, fol. 242.

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ADDERLEY.
GRESLEY
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enforced, therefore, only to the extent of the interest pledged, a term which has expired. The motion seeks to have the whole principal of the debt paid out of the rents and profits. Even on an application while the receiver was in possession, during the term, it would have been very doubtful whether such an order could be made; the regular direction to the receiver is to keep down interest, not to pay off debts and incumbrances. At least the Court never, for such purpose, directs a retrospective account of rents. The appointment of a receiver in a cause to which the incumbrancers are not parties, cannot aid their claim.

THE LORD CHANCELLOR :

[*579]

The sum in question could not be the debt of any *individual, and could remain the debt of the estate, so long only as the estate is charged. By the operation of the deeds, the estate has contracted debt, for a term of 100 years, and at the expiration of that term is discharged. The question comes round to this, whether the Court, having appointed a receiver, towards the close of the term of 100 years, when the mortgagee might, perhaps, have been entitled here, if not at law, to receive the rents, will pay the charge out of the rents so received? That question I will not decide on motion: the parties are at liberty to file a bill. But there is a great difficulty in the way.

The order appointing a receiver is for the benefit of incumbrancers only so far as expressed to be for their benefit, and only so far as they choose to avail themselves of it. The Court would not deprive them of the advantage of their legal estate; they might perhaps be obliged to come here to be examined *pro interesse suo*; but this Court would not interfere against them. But I apprehend that when the Court interposed to receive the rents beyond what was required for keeping down the interest on incumbrances, all the surplus rent, after payment of interest, was received for the benefit of the heir. I think that the mortgagee of a term, if he chooses not to lay his hands on the rents during the term, must be in the situation of a mortgagee in fee, who has suffered the rents to be applied for purposes other than the satisfaction of his security.

Motion refused.

Note.—The period covered by the two volumes of Wilson's Chancery reports is also completely covered by the three volumes of Swanston's reports, and almost all cases of any permanent interest reported in Wilson's Chancery reports are also to be found in Swanston's reports.

It is the almost invariable practice both in text books and in law reports when citing such cases to refer to Swanston's reports and not to Wilson's reports. In compliance with this practice, it is thought convenient to preserve the reports from Swanston only, except in a few cases where the corresponding report from Wilson is for some special reason to be preferred.—O. A. S.

BAILEY v. WRIGHT.†

(1 Wilson, 15—17; S. C. 1 Swanston, 39.)

1818.
Jan. 31.

ELDON, L.C.

[15]

In a marriage settlement monies belonging to the wife were settled, in default of appointment by her, in trust for her "next of kin or personal representatives," subject as to part to a trust for the husband for life: Held, that on the wife's death without exercising her power the husband was not entitled under the ultimate trust.

By indenture dated in 1794, previous to the marriage of the plaintiff with Miriam Orrell, 700*l.* belonging to the latter, was vested in trustees, as to 500*l.* in trust to pay the interest to the wife for her separate use during the joint lives of herself and her husband, and in case she should survive him, then in trust to pay the principal to her: but if she should die in the life-time of her husband, then in trust to pay the 500*l.* as she should appoint in manner therein mentioned, and in default of such appointment "in trust for the next of kin or personal representatives of the said Miriam Orrell:" and in trust to place out the remaining 200*l.* to the plaintiff during his life upon his bond and to pay the interest thereof to him, or permit him to retain the same during his life; and in case he should die in the life-time of his wife, "in trust to pay the principal to her; but if he should survive then to pay the same to such persons, &c. as she should appoint, and in default of appointment, "in trust for the next of kin or

[*16]

† *Briggs v. Upton* (1871) 7 Ch. 376, 41 L. J. Ch. 519.

BAILEY
v.
WRIGHT.

personal representative of the said Miriam Orrell." The wife died without issue and without exercising her power of appointment, and the bill was filed by the husband, claiming to be entitled to the trust monies under the ultimate trust contained in the deed: and the cause having been heard before the late Master of the Rolls, and his Honour having dismissed the bill with costs,† the plaintiff appealed from that decree to the Lord Chancellor.

Mr. Wyatt for the plaintiff, contended, that * * supposing the husband not to be entitled under the description of next of kin, yet he is entitled as the personal representative of his wife. He would take *jure mariti*, and recover by representation. * * If however the question be a doubtful one, the legal right of the husband should be allowed to prevail.

[17]

Mr. Wetherell, contra, was stopped by the Court.

The LORD CHANCELLOR said, he had read the settlement, and taking it altogether, not only that part of it which relates to the 500*l.* but also that part which relates to the 200*l.* which bore strongly on the question, he was of opinion that the husband in this case could not be intended by the words next of kin or personal representatives, and consequently that the decree was right. His Lordship added, that the interest as to the 200*l.* was evidently an interest to be provided for after the husband had enjoyed all he was to be entitled to.

Decree affirmed.

† 18 Ves. 49.

BELL v. FREE.†

(1 Wilson, 51—54; S. C. 1 Swanston, 90.)

A. and B. by deed jointly and severally covenanted with C. to pay her an annuity during her life, and by another deed of the same date A. and B. covenanted with each other that each should pay one-half of the annuity, and indemnify the other against all actions, "damages, demands, sums of money and expenses, which might be incurred by reason of the non-payment thereof:" Held, that B. having in consequence of A.'s insolvency made several payments of A.'s moiety of the annuity, was not entitled to interest on the sums he had so paid.

By indenture dated 6th March, 1800, George Clark and Thomas Plummer jointly and severally covenanted with Frances Du Puy, to pay to her during her life an annuity of 300*l.* by half yearly payments; and by another indenture dated 7th March, 1800, after reciting the former deed, and that it had been agreed between Clark and Plummer that notwithstanding their joint covenant to pay the annuity, yet *that each of them, his executors or administrators, should pay one moiety thereof, and that the survivor in case of the decease of one of them in the life-time of the annuitant, should not be liable to pay the whole of the annuity: each of them the said George Clark and Thomas Plummer thereby for himself, his heirs, executors, and administrators, covenanted with the other of them, his executors administrators and assigns mutually, that each of them, his executors or administrators should from time to time and at all times thereafter during the life of Frances Du Puy, well and truly pay one moiety or half part of the said annuity of 300*l.* at the times mentioned in and according to the true intent and meaning of the indenture of the 6th March, 1800, and well and effectually save, defend, keep harmless and indemnified, the other of them, his executors, &c. against one moiety or half-part of the said annuity, and all actions, suits, costs, charges, damages, demands, sums of money and expenses whatsoever, which might be incurred by reason of the non-payment thereof in the manner covenanted by the recited indenture to be paid by Clark and Plummer to Frances Du Puy.

† The decision is questioned by (1877) 6 Ch. D. 447, at p. 455, 46 MALINS, V.-C. in *McKewan's case* L. J. Ch. 819.—O. A. S.

1818.
Feb. 17, 20
—
Rolls Court.
PLUMER,
M.R.
[51]

[*52]

BELL
v.
FREE.

Clark having become insolvent in March, 1809, all the payments of the annuity after that time were made by Plummer alone; and Clark having afterwards died, this suit was instituted by his creditors, and the ordinary decree was made referring it to the Master to take the usual accounts of his estate and of his debts. The Master having by his report certified that a sum therein specified was due to Plummer for cash paid for several half-yearly payments of the annuity, but having disallowed a claim made by Plummer of interest on that sum, a petition was now presented by Plummer, stating that the interest on the several payments of the said moiety of the annuity up to the date of the report, amounted to 189*l.* 11*s.* 9*d.* and praying that the petitioner might be allowed and paid that sum over and above the sum reported due to him.

[58]

Mr. Heald and *Mr. James Stephen* in support of the petition, contended that interest on the sums paid might be recovered at law in the shape of damages; that it fell clearly within the meaning of the words "charges, damages, sums of money, and expenses incurred by reason of the non-payment" of the annuity; and that the Master ought to have allowed the petitioner's claim of interest.

Sir Arthur Piggott, *Mr. Hart*, and *Mr. Winthrop*, *contrà*, observed, that there was no precedent of the allowance of a claim of this nature, that it was quite inconsistent with the settled and uniform practice of the Court; that this was a demand of unliquidated damages; that the Master sitting in his office could not give damages, and that there could be no damages in the case of a debt not carrying interest in its nature.

Feb. 20.

THE MASTER OF THE ROLLS, after taking time to consider, was of opinion that the petitioner was not entitled to interest. His Honour observed, that it had been contended that the petitioner could have recovered interest in the shape of damages, but that in the case of *De Havilland v. Bowerbank* †, Lord ELLENBOROUGH

• † 1 Camp. 50.

said that the rule of considering how far the party was damnified was so wide that it would let in interest in almost every case; that if the party lost the use of his money, it was his own fault in not suing for it, and that he considered the safe rule to be, that to establish a right to interest there should either be a specific agreement to that effect, or something should appear from which a promise to pay interest might be inferred, or proof should be given of the money being used. And in the subsequent case of *De Bernales v. Fuller*,† the Court of King's Bench adopted the rule so laid down. His Honour said he would mention another subsequent case at law for *the purpose of shewing what the modern proceedings on this subject had been; in *Gordon v. Swan*,‡ it was held, that on an agreement for the sale of goods where a certain day was appointed for payment of the price, interest did not run on the price from that day, Lord ELLENBOROUGH observing, that the giving of interest should be confined to bills of exchange, and such like instruments, and to agreements reserving interest. His Honour also referred to *Rigby v. Macnamara*,§ as one which very much resembled the present. In that case Powell and Rigby were jointly bound to Drummonds for payment of 90,000*l.* and by a counter-bond Rigby became bound to Powell in the penalty of 180,000*l.*, conditioned for indemnifying Powell, his executors, &c. against all costs, damages, &c. he or they might sustain or be put unto on account of the non-payment of the 90,000*l.* and interest, or by reason of Powell having executed the former bond in anywise howsoever. Powell's executors having paid a large sum for principal and interest, the Master allowed them interest on those sums only which they had paid in respect of the principal, but not on the sums which they had paid in respect of the interest, and on an exception to the Master's report, Lord THURLOW was clearly of opinion that the Master had done right in computing the interest only on the monies paid on account of principal, and that Powell's executors could claim no more against Rigby's estate than Drummonds could have done, and consequently could not have interest on the interest paid them.

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v.
FREE.

[*54]

† 11 R. R. 755 (2 Camp. 426). 2 Camp. 429 n.).

‡ 11 R. R. 758 n. (12 East, 419; § 2 R. R. 92 (2 Cox, 415).

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v.
FREE.

The surety therefore in that case was held not entitled to interest, although there was a penalty to cover it.

On these authorities his Honour held it to be clear that the present petitioner was not entitled to interest, and therefore that the Master was right in

Disallowing his claim.

1819.
May 22.
June 19, 22,
26, 30.

THE ATTORNEY-GENERAL v. JOHNSON, THE
MAYOR, COMMONALTY, AND CITIZENS OF
LONDON, AND EARL GROSVENOR.

(2 Wilson, 87—106.)

ELDON, L.C.

[87]

On the filing of an information by the Attorney-General at the relation of an individual, and a bill by the relator, the LORD CHANCELLOR granted an injunction *ex parte*, on affidavits, to restrain a purpresture in the river Thames, which amounted *prima facie* to a public nuisance.

And it was held to be immaterial to whom the soil belonged, it not being competent either to the Crown or to a subject to use it for any purpose amounting to a nuisance.

[*88]

THIS was an information filed on the 19th of May, 1819, by the *Attorney-General* at the relation of W. R. Hodges, *and also a bill by the relator as plaintiff, stating that on the east side, and in front of, and opposite to, a row of dwelling-houses called Millbank Row, Westminster, one of which houses was in the relator's occupation, who dwelt there with his family, there was, long before the month of April, 1818, and had been ever since, up to the filing of the information and bill, a certain common public King's Highway called Millbank Row, for all persons on foot, and with horses, carts, and carriages to pass and repass; and on the east side of such highway there had been and was a wall and embankment of brick adjoining to and supporting the highway, and lying between the same and the ancient navigable river of Thames, and serving as a protection to persons passing on the highway, to secure them from falling into the river; upon which wall and embankment there had been and was a wooden rail or fence for the greater security of the persons, horses, and carriages passing and repassing along the highway; that the said river was, and from time immemorial had been, an ancient navigable river, and common King's Highway, for all persons

with their ships, vessels, boats, and crafts, to pass, repass, and navigate at their free will and pleasure, and to moor their vessels in convenient parts of the river, not impeding the navigation thereof; [and that the defendant Johnson had commenced to make certain encroachments upon the bed of the river Thames and upon the embankment thereof at Millbank Row by acts which constituted a public nuisance.]

THE
ATTORNEY-
GENERAL
c.
JOHNSON.

The information and bill farther charged, that the Mayor, Commonalty, and Citizens of London, or the Mayor for the time being, were by virtue of divers Acts of Parliament, and also by prescription, or other lawful ways and means, the Conservators of the river Thames, and as such had jurisdiction over, and were bound by law to conserve and preserve the said river, and the navigation and shores thereof, and all mounds and embankments thereof, and to prevent any obstruction thereto and encroachments thereon; but that the said Mayor, &c., had lately set up and claimed a right or interest to or in the soil and bed of the river, and to make grants thereof for the purposes of erecting wharfs and other buildings, or licenses for such erections or buildings, and under colour thereof had made some lease or pretended lease to the defendant Earl Grosvenor, who had made an under-lease to the defendant Johnson; or the Corporation had made such lease to him of the soil or ground forming part of the bed of the river which the defendant Johnson was obstructing as aforesaid, and upon which he proposed to erect the wharfs; and that such proceedings were carrying on by him with the privity and by the authority of the Mayor, Commonalty, and Citizens, and of Earl Grosvenor. * * *

[92]

The information and bill prayed a perpetual injunction to restrain all the defendants from obstructing and choaking up the bed of the river, opposite and near to Millbank Row, *or elsewhere; and from obstructing, narrowing, and impairing the said road, and removing the said wall, embankment, and rail-fence adjoining thereto, and from erecting or continuing to erect wharfs or any other buildings on the east side of and facing the said row of dwelling-houses, and between the same and the river Thames, or on the bed thereof, or on other parts of the bed of the said river. * * *

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[*94]

THE
ATTORNEY-
GENERAL
v.
JOHNSON.

On the 21st of May, 1819, a motion was made before the Vice-Chancellor for an injunction, on the filing of the information and bill, and on an affidavit of the relator verifying the material facts stated in the information and bill. * * *

May 22.

[95]

The motion for the injunction having been refused by his Honour, was now renewed before the Lord Chancellor [who granted the injunction].

June 22.

[Upon a subsequent application made on behalf of the defendants to dissolve the injunction :]

[101]

The LORD CHANCELLOR, in the course of the argument, made the following observations :

* * I am clearly of opinion that we have in this case nothing to do with any question respecting the title to the soil between high and low water-mark. This is not a record on which the *Attorney-General* is proceeding to assert the Crown's title, nor to pray for judgment on the part of the Crown, to recover possession by virtue of its title. I consider it to be quite immaterial whether the title to the soil between high and low water-mark be in the Crown, or in the city of London, or whether the city of London has the right of conservancy, operating as a check on an improper use of the soil, the title being in the Crown, or whether either Lord Grosvenor or Mr. Johnson have any derivative title by grant from any one having the power to grant. This is a record calling upon me to prevent a nuisance ; and if the Court has jurisdiction to prevent nuisances, it is a jurisdiction which may be exercised, whatever may be the title to the soil. It is my present opinion, that the Crown has not the right either itself to use its title to the soil between high and low water-mark as a nuisance, or to place upon that soil what will be a nuisance to the Crown's subjects. If the *Crown has not such a right, it could not give it to the city of London, nor could the city transfer it to any other person. The case therefore is reduced to two questions ; first, whether the Court has jurisdiction to prevent something which may be a nuisance, but which is not yet completed ; and secondly, whether the act now complained of is one of that description. In *The Attorney General v. Cleaver*,

[*102]

(18 Ves. 211),† if I recollect rightly, there had been considerable delay in making the application : and if the King's subjects have permitted the erection of a building which they were aware would, when completed, be a nuisance, without promptly applying to the Court to prevent it, the Court would not consider them entitled to the extraordinary assistance of a court of equity, but leave them to their legal remedy. But it is a different question whether the Court will interfere to prevent a nuisance threatened but not completed, and which, if permitted, may produce irreparable mischief, and whether the Court has not a jurisdiction to stop the progress of the intended work until it shall be ascertained whether it is a nuisance or not. I am inclined to think that the injunction in this case may well be continued for the present. The questions for consideration will be, first, as to the fact of nuisance, and secondly, whether there has been such delay in the proceedings on the part of those who seek to restrain it, as will prevent the Court from interposing, leaving them, as in other instances, to deal with it at law.

THE
ATTORNEY-
GENERAL
v.
JOHNSON.

[The proposed embankment was abandoned.]

[106]

CLARKE v. PRICE.†

(2 Wilson, 157—165.)

1819.
July 21, 22.

ELDON, L.C.

The Court cannot specifically perform an agreement, whereby A. agrees to compose and write reports of cases determined in a Court of Justice, to be printed and published by a particular individual for a stipulated remuneration, nor interfere by injunction to restrain the party from permitting reports written by him to be published by another person. The remedy, if any, is at law.

[157]

THE bill, filed the 15th of June, 1819, stated that in 1814, the defendant George Price, Esq. proposed to compose and write Reports of Cases argued and determined in the Court of Exchequer; and the plaintiff entered into a treaty with him as to the terms upon which the same should be printed and

† An application for an injunction against nuisance, which the Judge required to be tried at law before granting relief in equity.—O. A. S.

† *Whitwood Chemical Company v. Hardman*, '91, 2 Ch. 416, 60 L. J. Ch. 428.

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v.
PRICE.

[*158]

published; and that on the 27th of April, 1814, the following agreement *was signed by him:—"Memorandum; It is agreed between George Price, Esq. and William Clarke and Sons, as follows; Mr. Price undertakes to compose and write the Cases in the Court of Exchequer, commencing with Easter Term, 1814, and to be published periodically; the said William Clarke and Sons to be at the charge of all expenses of paper, printing, and advertising, which expenses, when discharged, to divide the profits of the said work equally (that is to say), one moiety to the said George Price, the other to the said William Clarke and Sons; all accounts to be adjusted at Christmas in every year, at the customary trade price and commission: And it is further agreed, that Messrs. Clarke shall be at liberty to relinquish the undertaking, should they think it advisable."

The bill farther stated, that in pursuance of the agreement, Mr. Price composed and wrote divers Reports of Cases argued and determined in the Court of Exchequer, and that the plaintiffs printed and published them at their own costs and charges, periodically and in parts; that the first volume consisted of three parts, the first being published in August, 1814, the second in May, 1815, and the third in March, 1816. That on the 2nd of March, 1816, a variation in the agreement was made between the plaintiffs and Mr. Price, and that a memorandum *thereof was made in writing and signed by Mr. Price, in the words following:—"March 2nd, 1816; Memorandum of agreement between George Price and William Clarke and Sons; Whereas, by an agreement bearing date the 27th of April, 1814, between the above parties, it was there stipulated, that Mr. Price should take the Reports in the Exchequer, and Messrs. Clarke should print the same, and divide the profits between the respective parties: And whereas the first volume of the Reports in the Court of Exchequer has been printed and published by the said George Price and William Clarke and Sons: And whereas the said George Price is desirous of selling

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all his copyright and interest in the first volume: *In consideration of which, the said William Clarke and Sons agree to give, and the said George Price agrees to accept of the sum of 166*l*. And the said George Price farther agrees to give any farther

assignment of the copyright, if required from him by the said William Clarke and Sons." That in pursuance of the second agreement, the plaintiffs duly paid to Mr. Price the 166*l*. That in farther pursuance of the agreement of the 27th of April, 1814, Mr. Price continued to write and compose Reports of Cases argued and determined in the Court of Exchequer; and that before the publication of the first part of the second volume, and on or about the 11th of November, 1816, a farther agreement was made between the plaintiffs and Mr. Price, and a memorandum thereof made as follows:—"November 11th, 1816. Memorandum of agreement between George Price, Esq. and William Clarke and Sons: Mr. Price agrees to the following terms, for writing and composing the second volume of his Reports in the Exchequer, sale of his copyright, and interest in the said volume; Messrs. Clarke, for the considerations above, to pay to Mr. Price, within one month after the publication of each part, the sum of 6*l*. 10*s*. for each sheet of sixteen pages royal octavo, and in the same proportion for any less quantity than a sheet; Mr. Price to be allowed the sum of 2*l*. on each part for corrections; all above that sum to be paid by Mr. Price, and deducted out of the payment for each part; Mr. Price to give a farther assignment, if required, at Messrs. Clarke's expense."

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PRICE.

The bill farther stated, that in pursuance of the agreements, Mr. Price composed and wrote a second volume of Reports of Cases argued and determined in the Court of Exchequer, and which the plaintiffs, at their expense, printed and published in four parts, the first part on the 20th of January, 1817, the second, on the 23rd of April, 1817, the third on the 1st of June, and the fourth on the 13th of September, 1817; and that the plaintiffs duly paid *the sums of money due to Mr. Price for the copyright of the second volume, according to the three memorandums of agreement. That in June, 1817, the plaintiffs and Mr. Price agreed to make a farther variation in the terms of the agreement of the 27th of April, 1814, and on the 19th of June, 1817, the following memorandum was signed:—"London, June 19th, 1817. Memorandum; Mr. Price agrees with Messrs. Clarke to receive for his interest in the agreement for the

[*160]

CLARKE
v.
PRICE.

Exchequer Reports, dated 27th of April, 1814, commencing at the third volume, the sum of 7*l.* per sheet, and 3*l.* per part for corrections ; all above that sum to be paid by Mr. Price, and if under 3*l.* the difference to be paid to Mr. Price until the sale shall exceed a thousand, but not to apply to any reprints above that number of the parts already published or to be ; Mr. Price agrees to give any farther assignment of the copyright and future interest to Messrs. Clarke, at their expense."

The bill farther stated, that in pursuance of the agreements of the 27th of April, 1814, and the 19th of June, 1817, Mr. Price wrote and composed, and the plaintiffs printed and published, at their expense, the third volume, consisting of four parts, and also two parts of the fourth volume, at the times specified in the bill, and that they had paid to Mr. Price the sums which by the agreements were due to him in respect of the third volume, and also divers sums on account of the fourth volume.

The bill farther stated, that Mr. Price had made some contract with the other defendants Brooke and Sweet, by which he had bound himself to write and compose new volumes of Reports of Cases argued and determined in the Court of Exchequer, and in the Exchequer Chamber, in order and to the intent that the same might be printed and published by Brooke and Sweet ; and the plaintiffs insisted that they were entitled to have an assignment duly made to *them, of all the copyright in such of the reports as he had written and composed, and to be the printers and publishers, and to have an assignment made to them of the copyright of all such of the said reports as he shall hereafter write and compose, upon making to him such payments as he is entitled to by virtue of the agreements of the 27th of April, 1814, and the 19th of June, 1817.

[*161]

The bill prayed, that the defendant, Mr. Price, might be decreed specifically to perform the said agreements expressed in the said memorandum, by permitting the plaintiffs to print and publish the reports of cases in the Court of Exchequer, so long as he should continue to compose and write the same, upon the terms agreed upon in the said memorandums respectively, and delivering to the plaintiffs the manuscripts of said reports for

that purpose, and by duly making and executing to the plaintiffs, an assignment of the copyright of such parts of the said work as had been published, and should thereafter be written and composed, the plaintiffs being ready to pay to him such sums of money as should be justly due to him; also praying an injunction to restrain Mr. Price from printing or publishing, or employing the other defendants, or any other person or persons than the plaintiffs, to print and publish the fifth or any subsequent volume or part of the same work, which Mr. Price should thereafter compose and write, and to restrain the other defendants, Brooke and Sweet, from printing and publishing the said work so written and composed, or to be written and composed, or any part thereof.

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v.
PRICE.

The answers submitted, that on the true construction of the agreements, Mr. Price was not bound to employ the plaintiffs as the publishers of all future reports to be written by him; that the plaintiffs were informed in October, 1818, of the contract between Mr. Price and the other defendants; that on the 1st of April, 1819, the work was advertised, as being about to be published, and that the defendants *had now printed a considerable part of the fifth volume, and had thereby incurred great expense; and that the plaintiffs having suffered such expense to be incurred, were not entitled to the assistance of the Court.

[*162]

An injunction having been obtained *ex parte*, on the filing of the bill, and on affidavit, a motion was now made to dissolve it.

Mr. Wetherell, Mr. J. Wilson, and Mr. Price, for the defendants Price and Sweet: Mr. Heald and Mr. Ching for the defendant Brooke, in support of the motion:

The first agreement constitutes a partnership without limitation as to time, and consequently dissoluble by either party. It is expressed to be determinable at the option of the plaintiffs. The second agreement is a sale of Mr. Price's copyright in the first volume. It is evident, from the circumstance of their entering into a new agreement for every volume, that no permanent agreement existed. The third agreement proceeds on a

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PRICE.

supposition that there was no subsisting contract applicable to the second volume. So far, therefore, there is no question respecting Mr. Price's obligation to continue the publication with the plaintiffs. If there be any difficulty it arises on the agreement of the 19th of June, 1817. The true construction of that agreement is, that it applies solely to the third volume.

[163] * * The right to compel a specific performance must be mutual; and it is clear that Mr. Price could not have had a decree for a specific performance against the plaintiffs. It is as incidental to specific performance alone that the injunction can be continued. * * But if the right of the plaintiffs to equitable relief had originally been clear, they have forfeited it by their own laches.

[They distinguished *Morris v. Colman*.†]

[*164] *Mr. Shadwell*, for the plaintiffs, admitted, that the language of the contracts could not give the plaintiffs the right of compelling Mr. Price to furnish them with notes of cases for publication, if he chose altogether to discontinue the publication of the reports; but he contended, that if notes of *cases were written by Mr. Price for publication, he was by the terms of the agreement bound to have them published by the intervention of the plaintiffs.

THE LORD CHANCELLOR :

The case of *Morris v. Colman* is essentially different from the present. In that case, *Morris*, *Colman*, and other persons, were engaged in a partnership in the Haymarket Theatre, which was to have continuance for a very long period, as long indeed as the theatre should exist. *Colman* had entered into an agreement which I was very unwilling to enforce; not that he would write for the Haymarket Theatre, but that he would not write for any other theatre. It appeared to me, that the Court could enforce that agreement by restraining him from writing for any other theatre. The Court could not compel him to write for the Haymarket Theatre; but it did the only thing in its power; it induced him indirectly to do one thing, by prohibiting him from doing

† 11 R. B. 230 (18 Ves. 437).

another. There was an express covenant on his part contained in the articles of partnership. But the terms of the prayer of this bill do not solve the difficulty; for if this contract is one which the Court will not carry into execution, the Court cannot indirectly enforce it, by restraining Mr. Price from doing some other act. This is an agreement which expressly provides that Mr. Price shall write and compose reports of cases to be published by the plaintiffs. In *Morris v. Colman*, there was a decree directing the partnership to be carried on; it could not be put an end to; and it was the duty of the parties to interfere. But I have no jurisdiction to compel Mr. Price to write reports for the plaintiffs. I cannot, as in the other case, say, that I will induce him to write for the plaintiffs, by preventing him from writing for any other person, for that is not the nature of the agreement. The only means of enforcing the execution of this agreement would be to make an order compelling Mr. Price to write reports for the plaintiffs; which I have not the means of doing. If there be any remedy in this case, *it is at law. If I cannot compel Mr. Price to remain in the Court of Exchequer for the purpose of taking notes, I can do nothing. I cannot indirectly, and for the purpose of compelling him to perform the agreement, compel him to do something which is merely incidental to the agreement. It is also quite clear that there is no mutuality in this agreement. I am of opinion that I have no jurisdiction in this case.

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v.
PRICE.

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Injunction dissolved.

The bill was afterwards dismissed, with costs, for want of prosecution.

WILSON'S EXCHEQUER REPORTS, EQUITY CASES

[*Note*.—Only one part of these Exchequer reports was ever published, viz., for Easter and Trinity Terms, 1817, and as the only case from this part which it is necessary to retain in the Revised Reports, is a case in Chancery and not in the Exchequer, it is thought convenient to place this isolated case with the other cases from Wilson's Chancery Reports, to which series it would more properly belong.—O. A. S.]

1805.

Aug. 8.

Rolls Court.
GRANT, M.R.

On Appeal.
1807.

Dec. 15.

ELDON, L.C.

ANDREWS *v.* MOWBRAY AND CASTLE.

(Wilson's Exchequer Reports, Equity Cases, 71—110.)

A land agent or steward is not incapacitated to purchase of his employer, and the sale, though beneficial to the purchaser, will not be set aside in equity if there was no imposition on the part of the agent, and no concealment of information as to the value. Bill charging such agent, and another defendant the plaintiff's solicitor, with fraudulently combining to procure the estate for the agent at an undervalue, dismissed with costs; the charge of fraud not being proved.

THIS was a suit instituted for the purpose of setting aside a sale made by the plaintiff Nesfield on behalf of himself and the other plaintiffs to the defendant Mowbray, of estates at Shotley and Waskerley in Northumberland, by articles dated 10th of May, 1800, which articles were carried into execution by conveyances in the month of October following. [The defendant Castle acted as the solicitor and general agent for the plaintiffs, and was charged by the bill with having knowingly permitted and assisted the defendant Mowbray, who was the land agent or steward of the property, to acquire the property at an undervalue in breach of his duty to the plaintiffs.] The object of the suit and all the facts of the case are fully stated in the judgment delivered by the LORD CHANCELLOR.

The case was argued at the Rolls in July, 1805, by *Richards, Romilly* and *Cullen*, for the plaintiffs; by *Piggott, Hart* and *Bell*, for the defendant Mowbray; and by *Leach* and *Heald*, for the defendant Castle: and on the 8th August following, his Honour Sir W. GRANT, M.R., delivered judgment [dismissing the bill with costs.]

[89]

From this decree the plaintiffs appealed to the LORD CHANCELLOR, and the cause came on to be heard before his Lordship

in the year 1807 ; having been again fully argued by *Richards*, *Sir Samuel Romilly*, and *Cullen*, for the plaintiffs ; by *Sir Arthur Piggot*, *Hart* and *Bell*, for the defendant *Mowbray* ; and by *Leach* and *Heald*, for the defendant *Castle*, his Lordship on the 15th December, 1807, delivered judgment to the following effect:—

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ELDON, L. C. :

On hearing this cause the MASTER OF THE ROLLS was pleased to decree the dismissal of the bill with costs. As against Mr. Castle the bill prayed nothing but the costs of the suit, and if it was maintainable against him upon any ground it was on this:—that he had been so involved and implicated in the gross frauds which were charged by this bill, and that it was so difficult to detect those frauds, that for the purpose of giving the necessary relief to the plaintiffs by having a discovery and a sufficient production of papers and instruments, it was not unfit that he should be made a party, and that he should contribute to the expense of relieving the plaintiffs from the effect of that gross fraud in which he was involved. In dismissing such a bill, his Honour could do no otherwise than dismiss it with costs. If it had been a bill proceeding upon the ground that Mr. Mowbray was in some sense to be considered as agent to these parties, which circumstance upon the application of some general principle established and acknowledged in a court of equity would incapacitate him from purchasing under any circumstances, that was a ground simple and intelligible, which might be justly stated as against any defendant whatever who being capable of being so characterized, had made a purchase which upon such general principles this Court would cut down : but that is not the case made by this bill. The main object of the bill is to charge the defendant Mr. Mowbray with contriving as early as the year 1795, when he first became acquainted with the concerns of this *estate, finally to make himself the purchaser of it, and with a view to that object, valuing the estate, and concealing its value, contriving, or at least by studied negligence managing, that it should be brought to sale at an auction where it could not be sold, and after all, taking advantage of the circumstances to become himself the owner : and it charges him for this

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purpose with entering into a combination with Mr. Castle to enable him in the character of agent to the estate, with the assistance of Mr. Castle the solicitor and man of business of the family, to take from that family for 11,150*l.*, an estate represented to be worth from 15,000*l.* to 20,000*l.* Under these circumstances, if his Honour had been of opinion that the bill could have been sustained upon the dry principle of the Court attaching upon him the character of an agent, he would have thought it his duty, as I should have thought it mine, to dismiss the bill without any costs; he could not well have dismissed it with costs to the defendants if he had so thought; but if he proceeded upon these circumstances of fraud, he ought to have marked it with costs for the sake of the character of the defendants merely, but as he was deciding that this was a case in which the general principle of the court was not violated, and deciding that which was a much more important circumstance in this case to all the parties, that this was not a case in which that gross fraud was in any manner proved, he was bound to dismiss the bill with costs.

It is necessary to state with great particularity the case as it is alleged in the bill on the part of the plaintiffs, and also the answers of the defendants, for I cannot agree with the gentlemen at the Bar, (and his Honour did not) that in a case of this sort no notice is to be taken of the answers. I do not know what is to become of the rule of this Court with respect to the weight of testimony, unless the court is to see how far and to what extent [*91] the number as well as credibility *of the witnesses goes in support of the answer of the defendants: for that purpose, therefore, it is absolutely necessary to look at the answers.

This bill is filed not by Mr. Nesfield only, but by the other parties, who with Mr. Nesfield are interested, and it will be to be considered how far Mr. Nesfield is to be viewed as the agent of the other parties and how far upon the consideration of a question of this sort his acts ought or ought not to be binding upon them. These ladies became under the will of Mr. Andrews, and under another will, beneficially entitled in the year 1792 to this property; they were all at that time unmarried, and most of them were not of age in the year 1793. In that year Mr. Nesfield

married one of the ladies interested in this estate :—and the bill proceeds to state that after the death of Mr. Andrews, the estates of Shotley and Waskerley being adjoining to each other and having been let together, Elizabeth Andrews, Fawcett, and Bright, who were the trustees under the will, appointed one Hopper to be land steward of both the estates : that he continued in such appointment till the middle of the year 1795, when the trustees removed him and directed Mr. Castle to apply to Mr. Mowbray to undertake the business of land-steward or agent in his room : that Mr. Mowbray consented to do this, and took upon himself the employment of land steward or agent : that as such he managed and directed the letting of the several farms upon the estates and the cultivation and repairs from the removal of Hopper till the estates were sold to him in the manner afterwards mentioned, and during the whole of that time Mr. Castle acted as agent for the plaintiffs in receiving the rent of the estates : that whilst Hopper had the management of the estates, the rents amounted to 349*l.* a year ; that after Mr. Mowbray took the management they were advanced by him to 395*l.*, besides wood lands, that 395*l.* being the utmost rent they would bear ; it then states that the expenses of repairs and other expenses *directed by Mr. Mowbray were so much increased, that the clear annual income had been reduced to somewhat below what it had been before Mr. Mowbray had the management of the estates : that they had no suspicion though the rents were reduced, of the integrity of Mr. Mowbray, but relying upon that and upon his great skill and experience in the management and cultivation of estates, and supposing therefore that the estates would not admit of any farther improvement without a great deal of trouble and labour, and would not make any adequate returns for a great length of time, the plaintiffs resolved in the beginning of the year 1800, to bring the estates to sale :—that Mr. Nesfield for that purpose consulted Mr. Mowbray as the land-steward or agent of the estates respecting the sale : that Mr. Mowbray several times assured Mr. Nesfield that the estates being let at as high a rent as they could bear, might probably fetch 12,000*l.*, which Mr. Mowbray said was in his judgment their utmost value, and that he advised Mr. Nesfield to have the

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estates advertised for sale by auction at Newcastle-upon-Tyne : that upon this, Mr. Nesfield directed Mr. Castle and Mr. Mowbray to cause the sale of the estates to be advertised ; that Mr. Castle and Mr. Mowbray having concerted and framed the advertisement for that purpose, Mr. Castle caused it to be inserted in the Newcastle and York papers. The bill then states the advertisement, which describes the property as consisting of 800 acres, and represents it in general terms as having a large plantation of valuable timber thereon which having been taken great care of is in a good and thriving condition. An application is then directed to be made for shewing the estate, to a person of the name of Beckwith, and with regard to the particulars, persons who wished to be informed are referred to Mr. Mowbray or Mr. Castle. The bill then alleges that Mr. Mowbray and Mr. Castle before the auction took place, formed a plan that they or one of them should become the purchasers of these estates, and for that purpose they determined to take means to discourage *any person from bidding at the auction, in order that they might afterwards obtain the estate at such price as Mr. Mowbray, in whom they knew the plaintiffs placed great confidence, should say it was worth : so that this auction was part of the management alleged, by which the estate was to be procured by these parties or one of them. It then states that on the 5th of May, 1800, Mr. Nesfield attended the auction, and Mr. Mowbray and Mr. Castle also attended ; Mr. Mowbray as the land-steward of the estate and agent for the sale on behalf of the plaintiffs, and Mr. Castle as the solicitor and law agent of the plaintiffs : that at this auction a Mr. Clayton with several other persons attended for the purpose of bidding, and they desired to be informed among other things, whether the tenants of the estates had any leases or agreements for leases, upon which Mr. Mowbray, who well knew that none of the tenants had any such leases or agreements, and particularly that Surtees Jopling, who was the principal tenant upon the estate, had not any lease or binding agreement for a lease, yet in pursuance of the design formed by them, declared to Mr. Clayton in the hearing of other persons then present, and in which declaration Mr. Castle also joined, that the tenants had been promised leases, and expected

and were entitled to the same, and particularly that Surtees Jopling had been promised or had an agreement for a lease of his farm for nine years; that the conditions of the sale of the estates prepared by Mr. Mowbray and Mr. Castle or one of them, were shewn to the company at the auction. The conditions of sale are then set forth in the bill, and the large plantation of valuable timber appears again in the conditions of sale, and there is one of these conditions, which I now take notice of, because it was very much observed on in the argument; that the purchaser is to pay down a deposit of 10 per cent. in part of the purchase-money, and sign an agreement for payment of the remainder on or before the 12th May, 1801, on having a good title, and that the vendors reserve to themselves three biddings, and the estate is to be *put up at the sum of 10,000*l*. The bill then states that in pursuance of their design, Mowbray and Castle did not cause the conditions of sale to be printed and distributed till the time of the sale. It then alleges that the vendors reserving three biddings to themselves was a very unusual thing, and not only calculated to prevent, but was inserted by Mr. Mowbray and Mr. Castle in the conditions of sale, for the purpose of preventing or discouraging persons from bidding at the sale: that the estates were put up by auction at 10,000*l*., but no farther bidding being made, the auction closed, and after it was closed, Mr. Clayton having expressed his desire to Mr. Mowbray and Mr. Castle to treat for the purchase by private contract, requested to be informed of the nature and terms of the agreement made with the tenants for granting leases, and to be written to on that subject in order to enable him to consider the value and make an offer for the estate: that Mr. Mowbray and Mr. Castle undertook to send him such information, and Mr. Castle promised to write to him for that purpose; that after the auction, Mr. Mowbray and Mr. Castle informed Mr. Nesfield that Mr. Clayton had declined all intention of purchasing the estate, and that Mr. Mowbray immediately offered to Mr. Nesfield to become himself the purchaser at 11,000*l*.: that Mr. Nesfield declined taking that sum, upon which, Mr. Mowbray offered the sum of 11,150*l*. for the purchase of the estates; and Mr. Nesfield being informed that that was the utmost that he could or would

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give for the same, and not knowing that any persons had made enquiry or were desirous of becoming purchasers, understanding also from Mr. Mowbray and Mr. Castle, that Mr. Clayton had given up all idea of purchasing, and therefore despairing of being able to dispose of the estates, he was induced to accept the offer of Mr. Mowbray. The case on the part of the plaintiffs then represents that Mr. Mowbray, upon that, directed and instructed Mr. Castle to prepare the agreement for the same which is stated at length in the bill, *and it contains a clause which it will be necessary for me to take notice of presently, that it shall be lawful to Mr. Mowbray to give discharges to the present tenants of the premises to quit possession on the 12th of May, 1801. The bill then states the circumstance of the conveyance having been prepared and great part of the purchase-money paid at different times ; of the conveyance having been finally executed, of a recovery having been suffered in Michaelmas Term, in order to make a good title : that Mr. Nesfield some time in August following put Mr. Mowbray in possession of the mansion-house, garden, orchard, and wood-lands ; and then the bill proceeds to allege a most material fact, that since the agreement of the 10th of May, 1800, and the execution of the conveyance, the plaintiffs have discovered that Mr. Mowbray had previous to the sale formed the plan of buying it, and had prevented persons from bidding at the auction, not only in the manner before mentioned, but in the manner afterwards stated. There is then an allegation which brings into controversy a fact on which there has been much argument, that Mr. Mowbray asserts that he never acted in the capacity of land-steward or agent for the estates, the plaintiffs on the other hand charging that he did act in that capacity, and that, acting in that capacity, he signed all or almost all the bills of charges for the cultivation and repairs of the estates, and that he did so as an authority to Mr. Castle to pay them, and that Mr. Castle paid them under the authority of Mr. Mowbray as such land-steward or agent, and that Mr. Castle had in his possession those bills of charges paid by him under the authority of Mr. Mowbray during the time that Mr. Mowbray was such land-steward ; that when those were produced, it would appear that Mr. Mowbray had signed them with his

name or initials: that he asserts he never was employed by the plaintiffs nor ever acted as agent or manager for the sale of the estates by public sale or otherwise. This is an allegation *that takes a distinction which is not immaterial, in my apprehension, in a case of this sort; the former is an allegation that he was not the land-steward or agent for the estates originally: this is an allegation that he was not the agent in the sale, attributing to him a character which goes beyond that, with reference to the doctrines and principles of this Court as land-steward or agent. There is then a charge that the advertisements were drawn by the direction and advice and with the knowledge and consent of Mr. Mowbray, that he acted as the principal agent for the sale of the estates, that he was there applied to by several persons as such agent to give them information respecting the sale, that upon such applications he did not refer them to Mr. Nesfield, but immediately answered them himself, and that in other respects he conducted himself ostensibly, and was in truth, the only manager of the sale: that after the auction was closed, Clayton having expressed a desire to treat by private contract, he applied to Mr. Mowbray for farther information, particularly respecting the agreements for leases: that Mr. Mowbray undertook to communicate with him upon the subject at a future time: that Mr. Mowbray directed Mr. Castle to write to Mr. Clayton the letter of the 6th of May, 1800, and that Mr. Castle did write the same with the privity and consent of Mr. Mowbray. The bill then goes on to allege that Mr. Mowbray does admit sometimes that he was agent for the estate, or agent for the sale of the estate; but then he says the purchase ought not to be avoided, because it was made fairly and openly, and without any misrepresentation, fraud, or practice, upon the plaintiffs, and for a fair and adequate price: that 11,150*l.* offered by him was the full value of the estate at that time: in answer to this the plaintiffs undertake to make out that soon after he was employed as land-steward or agent for the management of the estates, he, well knowing and having been frequently informed by Mr. Nesfield and other persons, that the estates were to *be sold in pursuance of the directions of the will of Mr. Andrews, formed the design of procuring the same to be sold to

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himself at an undervalue; that in pursuance of that design, he did as early as the year 1795, increase the expenses of the estates so as to reduce the income arising therefrom in a much greater proportion than he raised the rents, with a view to depreciate the value; and in furtherance of this fraudulent design, and to prevent competition at the auction, upon Mr. Nesfield's suggesting the propriety of advertising the auction in the London newspapers, Mowbray dissuaded him, and advised that the advertisement should not be inserted in the London or any other newspaper but the Newcastle and York papers, which being only published weekly, had a narrow and limited circulation: that Mr. Mowbray wilfully, and with a view of preventing purchasers from bidding, acquainted with the nature and value of the estates, caused the advertisement to be drawn up and published without making any mention therein of the rents of the estates, and that there were no leases thereon, and that there was none but the said verbal agreement with Surtees Jopling; and then follows a charge that Mr. Castle acted in concert with and by the advice and direction of, and assisted Mr. Mowbray in his fraudulent design of obtaining the estate at an undervalue: that it was a part of the same design that no particular description of the estates was drawn up or prepared, that no directions were given to Beckwith to show the estates to any person who might enquire; that they did not deliver to him any plan of the estates, although Mr. Mowbray soon after he became land-steward, had caused a full and correct plan and admeasurement to be made of the estates, and although a copy of the plan was at hand previous to the sale of the estates, that many persons applied to see the estates, and that they were disappointed upon those applications because he was not in possession of any plan, and that Mr. Nesfield was not informed that those persons who had applied, had made such application. The bill then represents, *that on the 5th of May, 1800, as Mr. Mowbray and Mr. Castle were going to the auction with the plaintiff Mr. Nesfield, Mr. Mowbray informed Mr. Nesfield, that if there should be no bidders for the estate at the auction, Mowbray himself would give 11,000*l.* for the purchase of the estates, by private contract; the offer is stated to have been made as

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they were going to the auction ; that with a view to obstruct the sale of the auction by keeping back as much as in them lay, all the information necessary and proper for persons who intended to bid for the estates, they omitted to print or distribute before the auction, the conditions of sale, that by reason of such omission, several persons who came to the auction and were prepared to make a deposit of such part of the purchase-money as the conditions required, would not bid ; that many persons were discouraged from bidding by reason of so large a deposit, and a deposit of such magnitude is also stated as another evidence of designed fraud ; that amongst others, a gentleman of the name of Todd was influenced by this consideration : that when Mr. Clayton was making enquiry respecting the leases, Mr. Mowbray, with the view and intention of diverting Mr. Nesfield from any intercourse or communication with Mr. Clayton, and for the purpose of preventing any competition for the purchase, informed the plaintiff that Mr. Clayton made such enquiries purely out of curiosity or ostentation, and that he was sure he did not intend, nor was a likely person to offer to purchase the said estates ; that Mr. Clayton (and that Mr. Mowbray knew it at the time he made this assertion) did intend to make an offer as soon as he should be informed of the state of the leases ; that Mr. Mowbray knew that Mr. Clayton had before the auction been to view the estates and to learn all he could respecting them ; and the same observations are made with respect to a gentleman of the name of Pemberton. Then there is another charge in the bill that after the auction several persons applied to Mr. Mowbray and Mr. Castle, for the purpose of treating with them for the estates by private contract, *but neither Mr. Mowbray nor Mr. Castle communicated to the plaintiff any such applications, but that they diverted them from their treaty for the purchase of the estate. Then the bill proceeds farther to allege, that since the conveyances have been executed, it has been discovered that Mr. Mowbray and Mr. Castle, knowing that Mr. Clayton was willing to treat for the purchase of the estates, were determined to prevent his treating for them, and for the purpose of making out that allegation, they state the letter of the 6th of May, 1800, which was written to Mr. Clayton, and the answer to that which

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was received on the Friday or Saturday of the week in which that 6th of May occurred. Then there is a charge in the bill that it was perfectly well known both to Mr. Mowbray and Mr. Castle that Jopling was not entitled to be considered as a tenant for six years, and that he had no binding agreement for the lease of the farm. The case then represents that with respect to the letter written and sent to Mr. Clayton and the answer that was sent by him, Mr. Nesfield, who was acting on the part of the plaintiffs, was entirely ignorant, that he knew nothing of the correspondence which those communications related to. Then there is an allegation as to the value :—that the estates were worth if they were fairly and openly sold either by private contract or public auction, the sum of 18,000*l.* and upwards, and the fact is stated that Mr. Mowbray, immediately after obtaining possession, raised the rents of the estates to 620*l.* a year ; that while he was land-steward, he kept a wood book, containing a full and particular account of all the timber and wood upon the estates, and that it would appear that the wood upon the estates extended to 92 acres, and was at the time of the sale, of the value of 1,000*l.*, or thereabouts : that the estates were, at the time of the sale, rated to the poor of the parish of Shotley, in respect of the wood lands, at 40*l.* a year ; that Mr. Mowbray, while he was such land-steward, made a valuation of the estates, which this bill represents to be in his possession, and by which it will appear that the estates *were worth 20,000*l.*, or some such large sum of money. It is then alleged that the improvements that have been made will not account for the rise of the rents ; that twenty acres having been taken out of the lands of the occupying tenants, the improvements that have been made since are in point of fact, all fraudulent improvements for the purpose of accounting for the rise of the rents : that the terms of the leases are not more beneficial to the tenants than those that they had before, and that this would appear if Mr. Mowbray would state the nature and terms of the leases : that in December, 1800, he secretly cut down a very large quantity of valuable timber and thereby procured the repayment of the purchase-money.

I have stated in this very particular manner the case as made by the bill on the part of the plaintiffs, because there is hardly a topic contained in this bill, which has not in some way been pressed in the argument of the case. I do not recollect that any part of Mr. Mowbray's answer was read, except that which describes him as being in his conception, in the situation of land-agent or steward. I take the answer of Mr. Mowbray to be a denial of all these allegations. With respect to the agency, he says he acted as honestly in his own opinion, as a man could do in the management of this estate, such as his management was; he says he had not the least idea in the world in the year 1795 when he made the valuation of the estate, of valuing it with reference to any purchase or sale; that upon that valuation he estimated the property and he declared at the time that he estimated it according to its utmost value, at 414*l.* a year, and he denies all purpose of making a valuation of it with a view to the future purchase of it himself; that in the year 1800, which is a fact beyond controversy, he employed a person to make a valuation of this estate with a view to determine whether he should become an offerer for it, and what terms he should offer; he says he communicated that fact to those persons *who were concerned; and he asserts, that Mr. Nesfield entered into a conversation with him, in which Mr. Mowbray said he would give him 11,000*l.* if he did not get a better price when sold by auction, and he denies any interference to prevent or discourage the sale. His answer certainly cannot be read in any degree as evidence of the truth of what it contains, but I apprehend it is the habit and according to the principles of the court, to look at what the answer is, in order to see how far the testimony in the case will authorize the court in cutting down the transaction that is in controversy between the parties. Before I state the answer of Mr. Castle, I must observe that whatever may have been the conduct of Mr. Castle, unless Mr. Mowbray's can be mixed with it, you cannot upon the conduct of Mr. Castle alone, unless you call in the aid of general principles, cut down this purchase of Mr. Mowbray's. To explain what I mean:—if Mr. Mowbray was only such an agent as he describes himself in his answer,

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has got by his agency is that which I have a right to have the benefit of as well as himself, I have no doubt that whatever Mr. Mowbray's idea might be as to the nature or character of his agency, the circumstance of his actually dealing with the estate as the facts prove he did deal with it, placed him in a situation in which, as the MASTER OF THE ROLLS thought, it did fairly raise the question whether because he was agent his purchase was upon that principle to be cut down.

I shall now look at Mr. Mowbray's situation as bringing forward the discussion of the principle of equity in the strongest way in which you can put it. Let us suppose, first, that he is to all intents and purposes the land-steward or agent:—secondly, let us suppose that he is not only the land-steward *or agent but the agent in the sale:—thirdly, let us inquire what would be the consequence of establishing the fact that he was the land-agent or steward and agent in the sale, regard being had to the circumstance that this contract was finally a contract made by private sale under the circumstances which have been proved in this case. It would have been very fortunate in the case of trustees, agents, and all other confidential persons, if courts of equity had rendered it less difficult to collect what is the practice of the Courts with respect to such subjects, and perhaps it would be infinitely better if the rule had been laid down as broadly as this:—that no trustee or land-agent, no land-steward, no agent for a sale, shall under any circumstances make a purchase: I believe that would have been a more convenient rule for mankind than that which does obtain. I am not aware however that any case has been decided which has gone the length of saying this, that a man who has been the land-steward or land-agent of another, shall not purchase of that other an estate of which he was such agent, dealing fairly and acting honestly: on the contrary, one of the first cases that I remember since I have practised, was that of the steward of a family, where Lord Northington opened the biddings, upon the ground not that the steward could not buy, but that he bought the estate under circumstances under which it was not fair he should have purchased. It was the same in *Gartside v. Isherwood*,† in which I

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† 1 Br. C. C. 558.

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apprehend Lord THURLOW did not mean to say that it was necessary that there should be a great difference of value between the worth of the thing that was sold and the price that was given ; he did not mean to lay down that if there had been any concealment or any improper conduct on the part of the steward, he would not cut down the bargain merely because the value was enough, but it was an important consideration for him to know what the value was, in order to ascertain by this means, *among others, whether the steward had acted improperly ; for in nine cases out of ten, a steward will know the value of an estate better than his master, and therefore the difference of value may make a great difference in the decision of a court of equity. If therefore Mr. Mowbray had been the land-steward or agent in the most extensive sense in which he is contended to have been, if he kept himself out of a situation in which he had any other duties than those which resulted merely from that character, it does appear to me that there is not a precedent in this Court to induce me to say that for that reason the sale shall not stand. In the case of *Beaumont v. Boulbee*, 7 Ves. 599,† where the defendant who was the steward of the plaintiff, made an agreement for a lease, nobody doubted that he was the steward, and Lord ROSSLYN laid down that though he might take that lease if he stood in the character of land-steward or agent, he was bound to take care that his master in dealing with him and granting that lease had full knowledge of all the circumstances respecting it, and all the information his duty required him to give him : it seems to me he was then at liberty to purchase.

The next question is whether Mowbray was more than a land-steward or agent ? and this bill contends that he was more than a land-steward or agent, that he was an agent in the sale. With respect to his being an agent in the sale, one can easily see how much greater injury and much more detriment to the principal may arise from it : and there would be much more mischief from considerations of public utility in permitting a man who is actually the agent in the sale, who is actually employed in the sale, to buy for himself, than in permitting a

† A question of accounts turning upon special facts, and consequently omitted from the Revised Reports.—O. A. S.

mere land-steward to buy; and yet I cannot find upon active research any case which has gone the length of deciding, though a good deal has been said upon the principle, *what would have been the case of an agent in the sale. It is contended that Mr. Mowbray was agent in the sale upon the various grounds mentioned in the bill, and with respect to those that have been proved, if I recollect right, they stand thus: that he was the agent in the sale because he was referred to as to the particulars, because he permitted himself to be referred to for the knowledge of those particulars, that applications were made to him for information, and that in some instances, for example, with respect to Mr. Clayton, he declined to give the information that was asked, but still conducted himself as a person from whom the particulars were to be enquired, and because he was a person who stated that he had papers upon the subject. With respect to his being concerned in the advertisements, of his having intimated to Mr. Nesfield that the advertisements should not be inserted in the London papers, there is no proof. It is not proved that he had anything to do with the advertisements, with the conditions, with settling the particulars, or with what Mr. Cullen says is called in Scotland the upset price: it is proved that he offered to give 11,000*l.*, and that he was cognizant of the fact that the estate was not to go under 12,000*l.*; but that will not make him an agent in the sale: it is proved that he did attend the sale, but not as is alleged as land-steward or agent, or as agent in the sale; it is according to the bill represented that he went as such, but according to Mr. Castle's evidence it is not so represented; he says a conversation passed between them about three weeks before this auction, and afterwards Mr. Castle communicated to Mr. Nesfield the conversation, in which Mr. Mowbray told him that he did not intend to go to the auction, but he says that in consequence of that conversation he has an offer made him to be franked in a chaise, and he goes with him to the auction: at the auction he answers enquiries, and enquiries of a very peculiar sort, for according to Mr. Clayton's evidence, Mr. Clayton asked whether there had been any valuation of the wood-lands; that Mowbray gave him a very satisfactory *answer to all his

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enquiries upon that head, and told him that 960*l.* was the valuation that had been made of the wood-lands, and unless my recollection of the evidence deceives me, he told him who had made that valuation, and at what time it had been made. To that extent therefore he mixes himself in the sale, but in my view of this transaction of the auction, whether Mr. Mowbray was or not the agent in the sale at that auction, as that auction did not lead to a contract either between these vendors and Mr. Mowbray, or these vendors and any other persons, taking him to be agent at the sale, unless the plaintiffs can make out as they endeavour to do, that the auction was a part of a system of management, that it was only one transaction in the course of the fraud which began prior to that transaction; that the auction was managed and carried on as the means of leading to something else; it does not appear to me that it is enough to make out that he was an agent in this sale by auction, unless they make out also that his agency in this sale by auction is the ground and the circumstance upon which rests and upon which alone rests that contract by private sale which afterwards took place:—for if that contract by private sale cannot be touched on the ground of fraud of which the previous auction is alleged to have formed a part, the question comes to this; that the estate is finally bought by private contract, by a person who is not an agent in the sale, but who had the character of land-agent and land-steward. And how does that stand? according to the representation of Mr. Castle, and according to the representation of Mr. Mowbray, uncontradicted by any one witness, after the sale by auction there is a treaty entered into with Mr. Clayton. Now upon the best examination I can give to the correspondence between Mr. Castle and Mr. Clayton, it seems to me impossible to infer fairly in a court of justice out of that correspondence, that not only this auction but that correspondence was a scheme to get those estates for Mr. Mowbray. It is clear beyond all question, that if it was worth 18,000*l.*, and if

[*107] *Mr. Mowbray had it in contemplation that it was worth 620*l.* a year, that if any body at the auction had bid above 11,000*l.*, Mr. Mowbray would not have had the estate. It is at least clear,

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that if it had brought 12,000*l.*, which Mr. Nesfield intended the estate should go for, Mr. Mowbray could not have had the estate, and therefore Mr. Mowbray rather than give 12,005*l.* would have lost an estate which he knew to be worth 620*l.* a year; the very circumstance of the communication made to Mr. Clayton that he might have the estate considering Jopling to have a lease, is some sort of evidence that Mr. Mowbray would not have had the estate, and Mr. Clayton's answer is an answer which desires that the issue may no longer be suspended. In the conversation on the subject of Mr. Mowbray's becoming the purchaser of the estate, it is said, that his answer must be given in a week, and allusion is made to the circumstance of his having some other estate in view: Mr. Richards says truly he might have proved that he had some other estate in view, but am I as a judge justified in not believing that to be the fact when it is sworn in the answer and no contradiction is given it? the utmost that could be stated would be that it was a ground of suspicion, but I never will say that that can be a ground of judicial decision. Then according to the evidence, how does the transaction proceed after this? It proceeds thus, if I am to believe the evidence, that it was Mr. Nesfield who made the offer to Mr. Mowbray to sell the estate for 11,000*l.* and it leads to the liquidation of the supposed demand of Surtees Jopling's lease. A great deal has been said upon that subject, and it is not for me to say how any of these parties have treated the tenant, but I am satisfied that at the time that auction was had, there was not one of them who thought it a right thing to bring it forward at that sale that Jopling was to have a lease, and yet I am satisfied that when the bargain was finally concluded some compensation was intended. It appears to me that the result of that bargain was this:—that *having at the auction stated that Jopling was entitled to it, the parties certainly at some time or other thought he was entitled to some compensation; that when Mr. Mowbray and Mr. Nesfield finally closed upon this, a larger price was given with respect to this lease than Mr. Mowbray originally intended to give, and that Mr. Nesfield took upon himself to make good to Mr. Mowbray the covenant contained in these articles of agreement, that it should be lawful for him effectually to give notice that the tenant

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should quit at the next May-day. That being so, Mr. Nesfield on the other hand probably meant no more than this, that it being a questionable matter whether under all the circumstances that had taken place Surtees Jopling could or not enforce the agreement for the lease, the discussion and decision of that question with Surtees Jopling he would take upon himself, but in case the decision was adverse to Mr. Mowbray, he was to have possession at May-day, and Nesfield would give it effect by that covenant, binding himself to indemnify Mr. Mowbray; that is the result of that transaction. This agreement being entered into, they proceed partly to execute it by the payment of a sum of money at different times, and lastly by the execution of the deed. But then it is said, here is such a monstrous rise in these rents from 340*l.* to 620*l.* a year, that of itself, or at least connected with other circumstances of the case is a ground upon which the court would proceed. Now that this circumstance is of itself a ground, if all other matters were clear, I cannot persuade myself. In the first place, if Mr. Castle's evidence be true this was represented as an improveable estate, it was so represented to Mr. Clayton, it was an estate incapable of any improvement but by the expenditure of money, and as far as one can collect the probability of the question of expenditure, it went to four or five years' rent. If that was so, the substance of the thing is this, not that the man pays 11,000*l.* only, but that he pays 11,000*l.* and the rents for *so many years to come to get possession of the estate at the end of those years. If there is any truth in the case on the part of the defendant, it is this: that the estate was bought with the view to improve it by the expenditure of money upon it. Then it is said he might have proved that he bought it with an intention to pursue that course, and the leases might have been produced to shew that that course had been pursued. But it is proper to shew that if the leases had been produced, they would not have proved any such fact; because according to Mr. Mowbray's answer, notwithstanding the rents were raised, and though the expenditure was made, there was no obligation to allow that expenditure: but it will not turn upon that, but whether the agreement was partly executed and what has stopped the farther execution of it. It is

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not at all unlikely that this suit should stop the farther execution of it: with respect to the expenditure actually made of 1660*l.* Adamson goes to that extent, and if you are to add to that, the probable expenditure that might be farther incurred, it does seem to me when you recollect that there was no person who viewed this estate but thought that 10,000*l.* was too much to set it up at, that 10,670*l.* was the worth of it, and when you recollect that 11,150*l.* was paid, and that the farther expenses were to be added as part of the consideration money, I cannot think that the circumstance of the rise of the rents which Adamson says ought to be a third, according to the expenditure, is a circumstance sufficient to authorize this Court to cut down the transaction. I do agree if it could be made out that Mr. Mowbray foreseeing and knowing that he could raise the rents to this particular height, had purchased the estate without meaning to lay out considerable sums, and without meaning to purchase in a rational sense that increase of rent, and that he had concealed that knowledge from his employers, that might have made a mighty difference in the case; and I do agree, that if all the other circumstances in the case were proved as stated in this bill, being connected with the rise of the rents, that *connection

[*110]

would have had a very material and important effect upon the judicial decision of this case: but I do not see that from those circumstances alleged, there is sufficient to shew that Mr. Mowbray has been systematically acting in fraud with regard to this property. I may also add, that Mr. Mowbray was not agent at the time of the final sale.

With respect to the question whether Mr. Nesfield is to be considered in any point of view as the agent of the other plaintiffs, I have looked through the record to see what I can make of it, and I do not see that there is any circumstance that would entitle them to relief that would not also entitle Mr. Nesfield: that being my opinion upon the whole, I think this

Decree must be affirmed.†

† The notes of the foregoing judgments were communicated by one of the gentlemen professionally engaged in the cause.

1818.
Jan. 17.

LEACH, V.-C.

[10]

SMITH AND SNOW *v.* SNOW AND OTHERS.

(3 Maddock, 10—11.)

The owner of an aliquot share in a trust fund of ascertained amount has a separate claim against the trustees of the fund for a transfer of such share.

THE plaintiff Smith, was the assignee of the plaintiff Snow's seventh part or share in certain funds standing in the name of trustees, two of the defendants. The plaintiffs Smith and Snow filed their bill against the trustees, and against six of the *cestuis que trust*, brothers and sisters of the plaintiff Snow, to have the seventh part or share of the plaintiff Snow transferred to the plaintiff Smith. To this bill, four of the defendants, brothers and sisters of the plaintiff Snow, (two of the defendants, his brothers, being out of the jurisdiction) put in the following demurrer :

" These defendants, &c. for cause of demurrer shew that no relief is prayed by the bill against these defendants, and that the said complainants have not by their said bill made such a case as entitles them in a court of equity to any discovery from or against these defendants, touching the several matters in the bill of complaint mentioned, or any of them, or as entitles them to any relief or assistance against the defendants. Therefore, &c."

Mr. Spranger, for the demurrer :

There was no necessity for making these persons defendants ; no relief is prayed against them ; and it is a rule that no one need be made a party against whom, if brought to a hearing, the plaintiff can have no decree.† What the plaintiff Snow is entitled to, *is ascertained, and the trustees can without difficulty transfer his share.

[*11]

Mr. Treslove, in support of the bill :

The defendants being interested with the plaintiff Snow in an

† *De Golls v. Ward*, mentioned in note to *Wych v. Meal*, 3 P. Wms. 310.

undivided fund, they were necessary parties. There is, besides, a charge of combination.

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Others.

THE VICE-CHANCELLOR :

There is no special charge of combination ; but only the general words as to combining, which are unimportant.

The question is, Whether a party who is entitled to a certain aliquot proportion of a certain ascertained sum, can file a bill to have it transferred to him, without making the persons entitled to other aliquot shares of the fund, parties. Persons not interested in the suit cannot be made parties, and it is sufficient to say that it is not alleged that these defendants have any interest in this suit. My only difficulty is, whether trustees can be called upon to act in the execution of their trust, by parts, as in that case seven different bills might be filed against them ; but that I think is not so great an inconvenience as the allowing of such a bill as this would be.

Demurrer allowed.

EX PARTE WORTHINGTON, IN RE GRAY AND
OTHERS.†

(3 Maddock, 26—27.)

1818.
Jan. 22.

LEACH, V.-C.

[26]

Under the old law of bankruptcy where a firm of four persons became bankrupts, the creditors of a firm of three such bankrupts might prove under the commission against the four.

THE petition stated that Benjamin Gray, James Gray, and Robert Wilson, carried on business as merchants at Liverpool, under the firm of Grays, Wilson, and Company ; and in 1815, they established another firm in London, in partnership with James Richardson under the firm of Benjamin Gray and Company, principally for the purpose of the firm of Gray's, Wilson & Co. drawing bills upon them in the course of their carrying on their business at Liverpool ; and Benjamin Gray & Co. also carried on the business of brokers :—That on the 26th August, a Commission issued against Benjamin Gray, James

† See now the Bankruptcy Rules, 1886, 269.

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TON
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GRAY and
Others.

Gray, Robert Wilson, and James Richardson, as carrying on trade in London, under which they were declared bankrupts; and John Watson and Thomas Harbottle were chosen assignees:— That the petitioners are creditors of the firm of Gray's, Wilson & Co. in the sum of 2,000*l.*; and the whole amount of debts due from the firm, amounted to 80,000*l.* The prayer of the petition was, that the assignees under the said commission might be ordered to keep distinct accounts of the estate and effects of the two firms of Gray's, Wilson & Co., and Benjamin Gray & Co.; and that the petitioners might be at liberty to call one or more meeting or meetings of the commissioners, and that the petitioners and the other creditors of the firm of Gray's, Wilson & Co. might be at liberty to prove their debts under the commission, to the account of the firm of Gray's, Wilson & Co.; *and that the estate and effects of that firm might be distributed *pro rata* amongst the creditors of the same.

[*27]

The Petition was supported by an affidavit.

Mr. Whitmarsh, in support of the petition :

An order is necessary in this case, to enable the petitioners to prove it not falling within the words of Lord ROSSLYN's General Order, 8th March, 1794. * * *

Sir Samuel Romilly, and *Mr. Montagu*. * * *

THE VICE-CHANCELLOR :

This case is within the meaning, though not the words, of Lord ROSSLYN's order.

Petition dismissed, without costs.†

† See *Ex parte Mason*, 1 Rose, 423.

MOUNTFORD *v.* SCOTT.†

(3 Maddock, 34—41; S. C. on appeal, T. & R. 274.)

1818.
Jan. 24.

The purchaser of an underlease is not bound to make any enquiry respecting the custody of the superior lease, and is therefore not affected by any equities arising out of the deposit of the superior lease prior to the creation of the underlease.

LEACH, V.-C.

[34]

THE original bill stated, that defendant Scott being indebted to plaintiff in 190*l.* 15*s.* for goods sold, and upon a bill of exchange, deposited with him, on the 10th April, 1809, a lease, 3rd March, 1809, from Stapp to Scott, his executors, &c. of certain ground for seventy-eight years:—That at the time when the lease was deposited, Scott was erecting and had nearly finished on the ground five houses, and he afterwards completed the same:—That afterwards the defendant Blake requested Scott to make over to him the leasehold premises, towards satisfaction of his debt to Blake of 400*l.*; Scott stated he could not comply with his request, as the lease was deposited with the plaintiff; Blake then applied to his solicitor Gyles, told him of the deposit with the plaintiff, and required his advice:—That in pursuance of his advice, it was agreed between Scott and Blake, that Scott should grant Blake an underlease, which he did 16th of February, 1810, of four of the messuages, for all the term Scott had therein, except a few days, at a pepper-corn rent; the consideration of such underlease being stated to be 200*l.*; and it was agreed that Blake should sell such underlease, and should advance Scott 50*l.* or 60*l.* out of the purchase money, to enable him to carry on his business:—That soon after the underlease, the defendant Warner *purchased the same from Blake for 275*l.*, and it was assigned by the latter to Warner in consideration of that sum. Gyles prepared the assignment to Warner [by deed poll, endorsed on the underlease.] The bill, stating the foregoing facts, and charging that Warner had notice of the deposit with the plaintiff at the time of the assignment to him, prayed an account of what was due to the plaintiff, and that the defendants, or some or one of them, might be decreed to pay to plaintiff, by a short day, what, on taking such account, should appear to be due to him for principal and interest on the security

[*35]

† See note, p. 193, *post.*—O. A. S.

MOUNTFORD of such indenture of 3rd March, 1809; and in default of pay-
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SCOTT. ment, that the defendants might be decreed to assign and convey to the plaintiff all their estate and interest in the lease of the 16th February, 1810; and that such of the defendants as should appear to have the lease of the 16th of February, 1810, and the deed poll indorsed thereon, in their possession or power, might be decreed to deliver up the same to the plaintiff; and if it should appear that Warner had not, before the execution of the assignment to him, and the payment of the purchase money for the same, any notice or reason to believe that said indenture of 3rd March, 1809, had been deposited with the plaintiff, then that defendants Scott and Blake, or one of them, might be decreed to pay to the plaintiff what should appear to be due to him for principal and interest, on the security of such indenture.

[*36]

By the joint and several answer of Scott and Blake, (which as to the following passages was read), they admitted, "That Scott being indebted to defendant Blake in the sum of 400*l.* and upwards for materials *which were principally used in building such four houses, and for money advanced to him, and being pressed by him for payment thereof, he, defendant Scott, did of his own accord propose to execute to defendant Blake a lease of said four houses, but not for the house which had been built prior to the deposit of the aforesaid lease, in or towards satisfaction of the said debt of 400*l.* and upwards; and he, defendant Scott, at the same time, but not before, informed defendant Blake of such lease being deposited with the plaintiff." Blake also, by his answer admitted, "that before such lease was granted to him by defendant Scott, he had been informed of the said original lease having been deposited with the plaintiff as a security for a sum of money due to him from defendant Scott; but insisted such lease so deposited with plaintiff by defendant Scott could only be considered as affecting the one house which was erected on the said piece of ground at the time of depositing such lease with plaintiff, if the same could be considered as having effect at all." Scott and Blake afterwards, by their answer, admitted his assignment of the lease to Warner for 285*l.* (not 275*l.* as stated in the bill,) but denied any agreement to pay part of the purchase money to Scott, on the sale to

be made by Blake ; and Blake admitted that he applied to his attorney, Gyles, who advised him a good title could be made to Blake of the four houses, as the lease deposited with the plaintiff did not affect such four houses, which had been erected after such deposit but only the one house which had before been erected.

In a passage of Warner's answer, read as evidence, *he admitted, that Gyles, at the time of the assignment to him by Blake, was his attorney, and employed by him to prepare, and did prepare, the deed of the 28th March, 1810, and perused and approved of the same on his behalf, and as his solicitor.

On the part of the plaintiff, Gyles, the attorney, was examined, and the following passage of his depositions read as evidence : " Saith, that he this deponent was employed as the attorney or solicitor of Robert Scott and James Blake (two of the defendants), to prepare the lease of the 16th of February, 1810 ; and saith, he this deponent was not employed as the attorney or solicitor of the said defendant Charles Warner, to prepare the deed poll of 28th March, 1810 ; and that he, deponent, did, as such attorney or solicitor, prepare the said lease ; and that he did, by the direction of Blake, prepare the said deed poll, and that he was before and at the time of the date or execution of said indenture of lease, and at or before the time of the date or execution of the said deed poll, informed by the defendant Scott, that the original lease to Scott was then deposited, or had been deposited, by Scott with the plaintiff."

The defendant Robert Scott was also examined by the plaintiff, and deposed that the lease to him, 18th April, 1809, was deposited with the plaintiff by him, for securing 180*l.* 18*s.* ; and that that sum, with interest, was due from him to the plaintiff.

* * *

Sir S. Romilly, Mr. Agar, and Mr. Parker, for the plaintiff : [38]

* * All the notice which an attorney has, affects his principal. Gyles was attorney both to Blake and to Warner, agent for vendor and vendee, and therefore all he knew was notice to his employers. Gyles, it is true, denies that he acted as attorney to Warner, but in that he is contradicted by Warner himself,

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[*39] who admits he acted as his attorney in the assignment from Blake to him. Besides, if a person derives his title through a deed, he must be considered as having notice of that *deed, and the circumstances attending it. If Warner had inquired for the original lease, he would have found it was deposited with the plaintiff, and he must suffer for his negligence. * * *Le Neve v. Le Neve*,† *Sheldon v. Cox*,‡ and *Hiern v. Mill*,§ were cited.

Mr. J. Martin, for the defendant Jeyes.

Mr. Hart, and *Mr. Wetherell*, for the defendant Warner, were stopped by

THE VICE-CHANCELLOR :

[*40] The plaintiff has a lien against every one claiming under Scott, with notice of the deposit. Scott made the underlease to Blake, because he could not produce the lease to him. Blake was made the instrument of a fraud upon the plaintiff. He assigns his underlease to Warner, who it is urged had constructive notice of the deposit with the plaintiff, as the underlease states the original lease to Scott from Stapp, and that put Warner under the necessity of inquiry as to the original lease, which inquiry would have led him to a knowledge of the deposit with the plaintiff; and neglecting to make the inquiry, *he must suffer by his negligence. But I think it was not Warner's duty to inquire what had become of the original lease, and that there is no imputation upon him for not inquiring. Such an inquiry is not usual in transactions of this nature. But then it is said that Gyles prepared the underlease to Blake, and that he was employed to prepare the assignment from Blake to Warner, and that when he so prepared such assignment, he knew of the deposit with the plaintiff, and it was his duty to communicate his knowledge to Warner, and that Warner was bound by his knowledge. No authority is produced to that extent. The agent stands in place of the principal; and notice

† 3 Atk. 646; S. C. 1 Ves. Sen. 54; and Ambler, 436.

‡ Ambler, 624.
§ 9 R. R. 149 (13 Ves. 114, 120).

therefore to the agent is notice to the principal; but he cannot stand in the place of the principal until the relation of principal and agent is constituted: and as to all the information which he has previously acquired, the principal is a mere stranger. The bill must be dismissed, but without costs.

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* * * * *

[This decision was affirmed on appeal, by Lord Eldon, L.C., July 23, 1823: T. & R. 274.]

Note.—This restriction on the doctrine of imputed notice is now defined by statute in Conveyancing Act, 1882, s. 3 (ii).—O. A. S.

WILSON v. METCALFE.

(3 Maddock, 45—46.)

1818.
Jan. 28.

On a bill to redeem, the mortgagee insisted that W. B., the heir at law stated in the bill to be dead, was alive. By the decree, a reference was made to the Master, to ascertain whether he was dead. He reported he was dead. Exceptions were taken to his report, and Master directed to review the same. In reviewed report he continued of opinion W. B. was dead. Exceptions were taken to the same, and an issue was directed whether W. B. was dead, &c. The jury found he was dead. Exceptions were then overruled; and held, the mortgagee ought not to pay the costs of the issue.

LEACH. V.-C.

[45]

A BILL was filed to redeem mortgaged premises. The mortgagee insisted that the heir at law of the mortgagor, who was dead, was one William Bentley, and that he was not proved to be dead. By the decree, it was referred to the Master to state, whether William Bentley in the pleadings named, was living or dead, and if dead, when he died, and who is or are his heir or heirs at law, and whether he died intestate, or left a will so executed as to pass real estates, &c.

The Master by his Report 26th January, 1811, stated, William Bentley was dead, though he had not been able to ascertain the time of his death, and no person having made any claim under any will of his, or produced any evidence to shew that he made any will, and administration having been granted to the plaintiff, he was of opinion that he died intestate, and J. Bentley, of, &c. was his heir at law.

Exceptions were taken to his report, and on argument, the

WILSON Master was directed to review the same, and that he be at
 METCALFF. liberty to receive farther evidence.

The Master made his reviewed report 16th February, 1814, in which he continued of the opinion expressed in his first report, that William Bentley was dead, but he had not been able to ascertain the time of his death.

[*46] Exceptions were again taken to the report, and on *the argument of the same, 5th April, 1814, his Honor (the late VICE-CHANCELLOR,)† directed an issue to try whether the said William Bentley was living or dead, and if the jury should find the said William Bentley was dead, the time when he died to be indorsed on the postea, with the usual directions.

The issue was tried at the York Assizes, when the jury returned a verdict, finding William Bentley was dead on the 5th April, 1814, the day mentioned in the issue; but they could not find the precise time at which he died, and assessed the damages at 1s., and for costs 40s.

The cause now came on again upon the exceptions, and the result of the trial of the issue being stated, the VICE-CHANCELLOR overruled the exceptions.

Sir Samuel Romilly, and *Mr. Daniell*, for the plaintiff, asked for the costs of the trial of the issue, which was very expensive; observing, that the objection on the part of the mortgagee was vexatious.

Mr. Trower, *contra*.

THE VICE-CHANCELLOR :

The mortgagee must not pay the costs of the issue. He cannot be charged with vexation when the Court has thought there was so much weight in his objection as to direct an issue.

Let the exception be overruled, without costs, and the deposit be paid to the plaintiff.

† *Sir Thomas Plumer*.

FLETCHER v. WALKER.

(3 Maddock, 73—74.)

1818.
Feb. 10.

LEACH, V.-C.

[73]

Testatrix directed her executor to sell two houses, and invest the produce (after payment of her debts) in real or Government securities, and to pay the interest to her three nephews until they attained twenty-one; and as each attained that age, to have one-third of the principal. The executor sold the houses, and applied part in payment of funeral expenses, &c. and paid the rest into his banker's hands, mixing it with his own money. The bankers failed. Held, the executor was liable to pay the money to the legatees.

MARY WEST, by her will, bequeathed two dwelling houses to her executor, the defendant Walker, to sell the same, and apply the produce in payment of her debts, and to place the residue upon real or Government security, at interest, in his own name, and apply the interest amongst his three nephews, Richard West, John West, and the plaintiff, until they attained twenty-one, and then to divide the principal among them. Walker sold the two houses for 130*l.*, out of which he applied 22*l.* 16*s.* 1*d.* in part payment of the testatrix's funeral and testamentary expenses; and on the 17th May, 1814, placed the residue, 107*l.* 5*s.* 11*d.*, in his bankers hands, to remain there for safe custody until the 16th of October following, when the plaintiff would attain twenty-one; not thinking it worth while to invest the money in the public funds or upon real security for such a short space of time, and more particularly as the plaintiff had caused notice to be given to the defendant Walker, that he should insist upon the payment of his share immediately upon his attaining twenty-one. The bankers became bankrupts on the 30th June, 1814. At the time of the bankruptcy, the defendant Walker had not only the 107*l.* 5*s.* 11*d.* in the bankers hands, but also monies of his own.

The question was, whether the defendant was responsible to the legatees for the loss of the 107*l.* 5*s.* 11*d.* occasioned by the failure of the bankers?

Sir Samuel Romilly, for the plaintiff.

Mr. Barber, for the defendant.

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FLETCHER THE VICE-CHANCELLOR :

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WALKER.

The defendant was directed by the will to invest the produce of the houses in Government or real securities ; instead of doing so, he places the money in a banker's hands, not appropriating it to the account of the legatees, which might make a difference, but placing it generally in their hands, with other monies of his own. Under these circumstances, he must bear the loss occasioned by the failure of the bankers. He had no excuse for placing it in their hands ; the testatrix's debts were all paid. He says he placed it there in May, 1814, because the plaintiff would be of age in the following October, and had intimated that he should want his share immediately ; but even this excuse fails, because the other two nephews, legatees with the plaintiff, were, and still are, under age. He must pay the 107*l.* 5*s.* 11*d.*, with interest. I shall not give the defendant his costs ; but I shall not make him pay costs.

1818.
Feb. 10.

FARR v. PEARCE.

(3 Maddock, 74—79.)

LEACH, V.-C.

[74]

F. on entering into articles of partnership, with B., paid a premium ; F. dies. After his death, B. sold the good-will of the trade. Held, on the construction of the articles, that the representative of F. was not entitled to a share of the money for which such good-will sold.

Semble, On a partnership between professional persons, the good-will of a business, on the death of one, survives.†

[*75]

IN 1809, T. B. Farr (since deceased) agreed to enter into partnership with the defendant, who was much older than Farr, and had established himself in business *as a surgeon, apothecary, and man-midwife ; and it was agreed that T. B. Farr should pay a premium of 2,000*l.* and should be admitted to a share of the profits and gains of the partnership for fourteen years, if the parties should so long live. A partnership deed was accordingly executed by the parties, 26th June, 1809 ; and amongst other things, contained the following clause :—" And it was further covenanted, concluded and agreed, by and between the said parties, that in case either of them should happen to die before the end, expiration, or other sooner determination of

† Or rather there is no goodwill in the ordinary commercial sense : 626, 635, 27 L. J. Ch. 714 ; *Arundell v. Bell* (1883) 52 L. J. Ch. 537, 31 W. R. 477.—F. P.
Austen v. Boys (1858) 2 De G. & J.

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the said term of fourteen years, then and in such case, the survivor of them, his executors or administrators, should and would accept and take the whole of the said co-partnership stocks, monies, goods, debts, and effects whatever, which, at or immediately before the decease of the party so dying, should be in any wise appertaining to them the said partners, for or by reason, or on account of their said joint business; and also in consideration thereof, and for a full recompense and satisfaction to be had and made to the executors or administrators of the party so dying, the surviving partner should pay to the executors or administrators of the deceased partner, so much good and lawful money of the United Kingdom, current in England, as the full value of the part and share of or belonging to the party so dying, of and in the said stock and trade, and such good debts as aforesaid, did or should appear to have been or amounted to, by and according to the yearly account then last before made and subscribed with their names as aforesaid; but if no such yearly accounts should have been therefore made, then so much like lawful money as the full value of the parties so dying was or should at the time of his death amount to. And it was thereby farther *agreed, by and between the said parties, that all such sum and sums of money as should become due and payable by the survivor of the said parties, his executors or administrators, unto the executors or administrators of the parties so dying as aforesaid, should be paid at the end of twelve calendar months next after such decease of the parties so dying, together with interest for the same, after the rate of five pounds per centum, to be computed from the decease of the parties so dying as aforesaid; and for the better securing the payment of the said monies accordingly, the surviving partner should within one calendar month after the decease of said partner so happening to die, enter into and become bound unto the executors or administrators of the partner so deceased, in one or more bond or bonds, of double penalty, conditioned for the payment to them of such monies, at such times and in such manner and form as aforesaid; and should also thereupon become bound to the same executors or administrators in one or more bond or bonds of sufficient penalty, for saving and

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[*77]

keeping indemnified the heirs, executors and administrators of the party so dying, and his and their lands and tenements, goods and chattels, of, from and against all debts which at the time of his decease were justly owing by said partners, for or on account of said joint business, or for any goods, bills, notes, matters or things belonging or in anywise touching or relating to the same, or from and against all actions, suits, damages and expenses on account of the same debts, every or any of them, all which said debts said surviving partner should and would pay and satisfy in due and convenient time. And it was thereby farther agreed, that the executors or administrators of the partners so dying, should and would, upon the executing such *bonds as aforesaid, legally and effectually grant, assign and release unto the surviving partner, his executors and administrators, all that part, share, right, title and interest, claim and demand whatsoever, of them the executors or administrators of the partner so dying, of, in and to the said joint stock and business; and all the monies, goods, bills, notes, debts, other than such debts as are thereafter mentioned, profits, gains, and other estates and effects whatsoever, which at the time of such his decease were in co-partnership between said partners, or jointly owing or belonging unto them on account of their joint business; and in case either of said co-partners should die during the co-partnership, then all such bad and desperate debts due and owing to, and on account of said joint business, as should not have been deemed and accounted a good estate, and as such cast up and included in such yearly account or accounts to be made and stated as aforesaid, if any such account or accounts had been stated, should with due convenient speed be divided and shared between the surviving partner, or his executors or administrators, and the executors and administrators of the partner so dying as aforesaid, in proportion to the respective shares and interests of said partners in their said joint trade; and thereupon the surviving partner, and the executors or administrators of the deceased partner, should give unto each of them, and their executors and administrators, full power to get in and recover his and their respective parts of such bad debts."

The partnership commenced, 1st January, 1810. In June,

1812, T. B. Farr died, intestate, and the plaintiff administered to him. After the death of T. B. Farr *the defendant sold the business to a Mr. Fox, for a considerable sum of money. The prayer of the bill, was, for an account of the partnership dealings, &c. and that the plaintiff might be declared entitled to a return of part of the premium of 2,000*l.*, or to some allowance by reason of the death of the intestate, and that the amount might be ascertained; or that the defendant might account for the value of the good-will of the trade or business, and of the money which he had received or contracted to receive for the same from Mr. Fox; and that plaintiff might have an allowance made to him in respect thereof, &c.

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v.
PEARCE.
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The principal question was, whether the plaintiff was entitled to any share of what the good-will of the trade produced on the sale to Fox, after the death of T. B. Farr?

Sir Samuel Romilly, and *Mr. Roupell*, for the plaintiff, contended that the representative of the deceased partner was entitled to a share of the sale of the good-will of the trade.

Mr. Hart, and *Mr. Swanston*, for the defendants.

THE VICE-CHANCELLOR (stopping the defendant's counsel):

In this case the articles define the interest which the representatives of a deceased partner are to take, and there is no provision which gives them the benefit of the good-will of the concern. But if the general question had arisen here, I think it would have been difficult to maintain that where a partnership is formed between professional persons, as surgeons, and one dies, the other is obliged to give up his business, and sell the connection for the joint benefit of himself and the estate of his deceased partner. When such partnerships *determine, unless there be stipulations to the contrary, each must be at liberty to continue his own exertions; and where the determination is by the death of one, the right of the survivor cannot be affected. Such partnerships are very different from commercial partnerships. As to so much of the bill, therefore, which prays a return of part of the premium, or a share of what the good-will of the trade sold for, the bill must be dismissed. The other account the plaintiff is entitled to.

[*79]

BATEMAN *v.* DAVIS.†

(3 Maddock, 98—99.)

1818.

Feb. 27.

LEACH, V.-C.

[98]

Power to trustees, with consent of A. under her hand, with two witnesses, to advance 1,500*l.* to her husband. They advance the money, without the consent of A. Afterwards A., by an instrument under her hand, attested by two witnesses, testifies that the money was advanced with her consent. Held, on a bill filed by A., that the trustees must refund the 1,500*l.*

FROM the bill and answer in this cause, the facts appeared to be, that by a settlement on the marriage of the plaintiff, a power was given to the trustees, “at any time or times after the solemnization of the then intended marriage, by and with the consent of (the plaintiff) Dame Ann Bateman, if living, to be testified by writing under her hand, and attested by two or more credible witnesses, but in case of her death, then in the said trustees own discretion, to transfer and sell out so much or such part or parts of the sum of 6,000*l.* Bank Reduced Annuities, as they in their discretion should think proper, not exceeding in the whole the sum of 1,500*l.* and to pay and apply the same for the promotion and advancement in the world of (the defendant) Sir John Bateman (the husband of the plaintiff).

The trustees, without the written consent of the wife, sold out 1,500*l.* stock, and paid the same to the husband of the plaintiff.

After the stock had been so sold out, the plaintiff executed a deed, attested by two witnesses, in which the settlement was recited, and the power therein, and the advance of the money without a written consent, as prescribed by the power; and she then, by the deed, “did testify and declare that it was with her full consent and approbation that the trustees had sold out the 1,500*l.* Three per cent Bank Annuities, in her *settlement mentioned, and paid the produce arising therefrom to her said husband, said John Bateman.”

The question was, whether, under these circumstances, the trustees were bound to replace the 1,500*l.* stock?

Mr. Hart, and *Mr. Brewer*, for the plaintiffs.

† Distinguished by *Stuart, V.-C.*, were held to be barred by acquiescence.—*F. P.*
Stevens v. Robertson (1868) 37 L. J. Ch. 499, 502, 503, where the *c. q. t.*

[*99]

Sir S. Romilly, Mr. Heald, and Mr. Barber, for the
defendants:

BATEMAN
F.
DAVIS.

They contended, that though the money was advanced without consent, yet that the subsequent ratification by the plaintiff exonerated the trustees.

THE VICE-CHANCELLOR:

The settlement gives a discretion to the trustees, with the consent of the plaintiff, to advance 1,500*l.* stock to the husband of the plaintiff. The trustees think fit to advance the 1,500*l.* without the consent of the plaintiff. They cannot justify this breach of trust by alleging the subsequent approbation of the plaintiff. The actual advance of the money to the husband, who perhaps had spent it, created a pressure upon the judgment of the plaintiff, which gave to her subsequent approbation a very different character from the free consent required by the settlement. The assets of the trustees (they being dead) must refund the 1,500*l.* stock, and pay the costs of the suit.

THOMAS MANSFIELD, ISAAC TAYLOR, AND
MARY MANSFIELD, WIDOW, *v.* SHAW.

(3 Maddock, 100—101.)

1818.
Frb. 28.

LEACH, V.-C.

Injunction, to restrain defendant from receiving a testator's effects, and to stay trial of actions, granted before answer, under the circumstances.

[100]

WILLIAM SHAW, by his will, 16th February, 1817, appointed the plaintiff and another person his executors, and thereby revoked all former wills. On the day of the funeral of William Shaw, the will was read in the presence of the plaintiffs and the defendant. The defendant, however, set up a prior will, of the 1st January, 1817, under which he was executor and universal legatee, and proved the same, and took possession of a considerable part of the testator's effects, and threatened to possess himself of the whole. The plaintiff Mansfield (the other executor declining to act) instituted a suit in the Ecclesiastical Court to establish the will last made, and to revoke the probate obtained

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by the defendant, and caused witnesses to be examined, and the suit remained merely for judgment. The defendant was in insolvent circumstances, and aware his probate could not be sustained, was possessing himself of the estate and effects of the deceased, and had brought several actions against persons indebted to the testator ; and, amongst other actions, one against the plaintiff Thomas Mansfield, to recover the sum of 100*l.* ; another action against the plaintiff Isaac Taylor, for 100*l.* ; and another against the plaintiff Mary Mansfield, for 50*l.* ; and intended proceeding to trial in such actions at the ensuing Assizes for Warwick. The general issue was pleaded to the actions, in the expectation that the Ecclesiastical Court *would, before the trial, recall the probate obtained by the defendant, who would then have discontinued his actions ; or if not, the defendants to the same might avail themselves of it by a plea, *Puis darrein continuance*.

Upon a bill being filed, stating these facts, and praying an account, a receiver, and an injunction against intermeddling with the effects, and against proceeding in the actions of law, and an affidavit verifying the statements in the bill, and of service of the subpoena on the defendant, a motion was made by

Mr. Rose, for an injunction, and to stay the trial of the actions at the ensuing assizes.

THE VICE-CHANCELLOR :

As you state the defendant is insolvent, you have shown a case where irreparable mischief may ensue ; and, under the circumstances, take your motion, upon paying into Court the money sought to be recovered by the actions.

EX PARTE PIGOU AND ANOTHER, IN RE HARVEY.†
(3 Maddock, 136—137.)

1818.
March 14.

Sale of goods, to be paid for at the end of the year in which they were purchased, but if paid for before the end of the year, 20 per cent. discount to be allowed. They were not paid for within the year, and held on the bankruptcy of the purchaser, that proof could not be made of the whole debt, without deduction for discount. [136]

THE petitioners were gunpowder manufacturers, and sold gunpowder to Harvey, the bankrupt, to the amount of 2,144*l.* 9*s.* 2*d.*, who bought the same to sell again. The gunpowder was to be paid for on a credit of twelve months, or 20 per cent. discount upon prompt payment; the twelve months being calculated from the end of the current year in which the sale of the goods was made, and the purchaser not entitled to the discount unless payment was made within the current year in which the goods were purchased. The account between the petitioners and the bankrupt was thus stated:—

	£	s.	d.
Dec. 31, 1814:—To balance remaining	98	14	8
To amount of gunpowder supplied from			
1st Jan. 1815 to 31st Dec. 1815 .	1,344	3	6
To amount of gunpowder supplied			
1st Jan. 1816 to 21st Feb. 1817 .	701	11	0
	<u>£2,144</u>	<u>9</u>	<u>2</u>

On the 1st March, 1817, a commission of bankrupt issued against Harvey, under which he was found bankrupt, and assignees chosen. The petitioners applied to prove the debt, but the Commissioners refused to admit proof of the whole sum of 2,144*l.* 9*s.* 2*d.* insisting that the petitioners were bound to deduct 20 per cent. discount from the amount of their demand, and only prove for the residue, but allowed a claim for the full amount till the opinion of the LORD CHANCELLOR was *obtained. [*137]

The petition prayed that the petitioners might be allowed to prove the whole of this debt.

The petition was supported by affidavit.

† But see *In re Cumberland, Ex parte Worthington* (1876), 3 Ch. D. 803, 45 L. J. Bky. 135, and the Bankruptcy Act, 1883, sch. 2, § 8.—O. A. S.

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PIGOU
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The *Solicitor-General*, in support of the petition.

Mr. Cooke, and Mr. Pemberton, *contrà* :

The case of *Ex parte Ainsworth*† is in point to shew that the commissioners were right in insisting upon a deduction of 20 per cent. That case has been acted upon ever since by commissioners.

THE VICE-CHANCELLOR :

It may be difficult, in legal reasoning, to arrive at the conclusion in *Ex parte Ainsworth*.† Lord ROSSLYN seems to have come to that decision, as a rule of expediency, to avoid the frauds which might otherwise be practised : and as that case has ever since been acted upon, I shall not now depart from it. The proof must be as in that case.

1818.
March 11, 14.

LEACH, V.-C.

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EX PARTE RICHARDSON AND OTHERS, IN RE HODSON AND OTHERS.

(3 Maddock, 138—137.)

Testator disposes of his property by his will, and directs a trade, in which he was concerned, to be carried on after his death. Held, that only the testator's capital in the trade was liable to the creditors of the trade, who became such after the testator's death, and that they had no farther claim upon his assets.

On the 25th March, 1808, articles of partnership, for fourteen years, were entered into by James Hodson and James Hargreaves, in the business of timber merchants; and it was thereby agreed, that the parties should advance, into one joint stock, the following sums; viz. Hodson, in the value of timber and in cash, 8,000*l.*, and Hargreaves 5,000*l.*, amounting together to 8,000*l.*, which was to be the capital for carrying on the business. Hargreaves was to receive interest for the 2,000*l.* which he advanced towards the capital, beyond that which Hodson advanced. The profits of the business were to be applied in

† That case, as reported under the name of *Ex parte Aynsworth* (4 Ves. 678), appears to have been decided by Lord LOUGHBOROUGH, L.C. to be

a fraudulent attempt to evade the usury laws, the repeal of which has now deprived that case of any farther application.—O. A. S.

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RICHARDSON
In re
HODSON.

payment of that interest and of rent, and then 10 per cent. on the profits were to be paid to Hodson, as a compensation for his skill and trouble in the management of the business; and the balance of the profits were to be added to the capital of 8,000*l.* (unless the parties otherwise agreed) until such capital should amount to 10,000*l.*; and when the capital was increased to that sum, the profits were to be equally divided. It was also provided, that in case of the death of Hodson, the partnership should cease; but if Hargreaves died before the expiration of the fourteen years, the partnership was to continue between Hodson and such person as Hargreaves should, by any writing in his life-time under his hand, or by his will, declare to be his successor in the concern until the end of the term.

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[Hargreaves died 12th September, 1812, having made his will 9th June, 1812, whereby after disposing of all his estate in favour of his widow and his son and daughter and their issue, he declared that his executrix and executors should be his successors for the benefit of his estate, in a business, which he then carried on in partnership with James Hodson, of Liverpool, timber merchant, under certain articles of partnership. And he] appointed his wife, and W. M., N. R. and J. R., executrix and executors of his will, and gave to the executors 50*l.* each; and declared that the receipt of his trustees should be a full discharge to purchasers, and that his executors should not be chargeable for any losses which might happen to his estate without their wilful default, nor for more than they should severally actually receive, but only for his and their own acts; and that they should retain their expenses in the performance of the trusts of the will. * * *

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The executors of Hargreaves declined to carry on the business; but Mary Hargreaves the executrix, at the instance of her son and daughter, agreed to continue the business, which was done accordingly, under the management of Hodson; and on the 16th June, 1813, Mary Hargreaves alone proved the will of her husband, the executors declining to act as such, if the business was carried on.

At Hargreaves' decease there was due to him, on the balance of his account of capital brought into the concern, 7,145*l.* 18*s.* 11*d.*,

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and to Hodson, 2,877*l.* 18*s.* 5*d.*, exclusive of their respective shares of the profits of the business, which were adjusted up to Hargreaves' death, and amounted to 18,567*l.* 1*s.* 10*d.*

In the beginning of the year 1815, the partnership sustained heavy losses, by a fall in the price of timber and otherwise; and Hodson applied to Mary Hargreaves for a farther advance of money; and in consequence, she, as the executrix of her husband, sold out stock, which produced 9,064*l.* 2*s.* 8*d.*, which was paid to Hodson, and for which the executrix had credit in the partnership books, in the account which contained the particulars of capital advanced by the testator in his life-time; and shortly after, a farther advance was made to the concern of 2,360*l.* 8*s.* 11*d.*, the produce of part of the testator's stock; and for which like credit was given in the partnership books.

Between the period when the two advances were thus made, a security was executed by the bankrupts to the trustees in the settlement made previous to the marriage of the testator's daughter, 17th April, 1815, for the sum of 2,850*l.*, of certain real property belonging to the copartnership, purchased with their funds; which security was given in part of the sum of 5,000*l.* bequeathed by the testator to his daughter.

On the 24th August, 1817, a commission issued against Hodson and Mary Hargreaves, under which they were found bankrupts; and assignees were chosen.

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At a meeting of the Commissioners, 25th November, 1817, Mary Hargreaves proved a debt of 8,844*l.* 6*s.* 7*d.* for so much money by her, as executrix, lent and advanced, out of her late husband's estate, to herself and Hodson before the bankruptcy: being the before two mentioned sums of 9,064*l.* 2*s.* 8*d.* and 2,608*l.* 11*s.* after deducting the amount of the security given to the trustees of the daughter's settlement.

The partnership obtained great credit in consequence of James Hargreaves being a partner, and from the representations made, after his death, that his representatives continued to be partners in the concern; and Mary Hargreaves, in confirmation of such representations, sent a note to J. Moss, Esquire, banker, in Liverpool, at the request of Hodson, representing that she was sole executrix of her husband, in consequence of which she had

full power to act as a partner in the concern of Hodson & Co., and in whatever way she might judge to be beneficial to the interest of the estate.

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RICHARDSON
In re
HODSON.

Under these circumstances the present petition was presented by the petitioners (the assignees of the bankrupts), they being advised that Mary Hargreaves was not entitled to prove the aforesaid sum of 8,844*l.* 4*s.* 7*d.*, or any other sum of money, as a debt under the commission, until all the other creditors of the concern were paid; because the monies advanced by her as executrix, were for the purpose of paying the debts of the copartnership, contracted by Hodson, by virtue of and under the articles of partnership, to the performance of which the personal representatives of Hargreaves *were bound, under the covenants therein contained, and of the directions given in and by his will. The prayer of the petition was, that the proof might be expunged.

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Sir S. Romilly, Mr. Cooke, and Mr. Bickersteth, for the petitioners :

The profits of this trade were to form part of the testator's assets; and the trade being directed to be carried on by the executrix, she was entitled to employ part of his assets in support of the trade. The legatees, the son and daughter, could not be paid the legacies left to them by the testator, unless out of the profits of this trade; it was carried on for their benefit, and they must be considered as partners. [They cited *Hankey v. Hammock*, referred to in *Ex parte Garland*, 7 R. R. 352, 354, (10 Ves. 110.†)]

Mr. Bell, contra :

* * The creditors* have no claim upon the assets of the testator, except to the extent he has made them liable by his will. By this will, the assets are not made liable to the trade. The capital in the trade was all that can be liable. It was all the testator thought necessary to embark in the trade. The testator has given several legacies by the will, and has expressly bequeathed the residue of his estate and effects. It was the duty of the executrix to appropriate a sufficient part of the

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[*156]

† See *McNeillie v. Acton* (1853), 4 De G. M. & G. 744, 752.—F. P.

Ex parte
RICHARDSON
In re
HODSON.

testator's effects for the payment of these legacies. On a bill filed for that purpose, they would have been compelled to do so. *Ex parte Garland*† is an express authority, that when a testator directs a trade to be carried on, only the property declared to be embarked in the trade, is answerable to the creditors of the trade.

Sir S. Romilly, in reply. * * *

[157] THE VICE-CHANCELLOR :

A trustee under a will, carrying on a trade, pledges the trust property given to him for that purpose, and also his own property; but what is the trust property given to him for that purpose, must depend upon the terms of the will.

In *Ex parte Garland*, the testator had directed that a specific sum should be applied for the purpose of the trade; and that sum, and no more, was held liable to the creditors of the trade.

In *Hankey v. Hammock*, the MASTER OF THE ROLLS thought the testator had made his general assets applicable to the purposes of the trade, and they were therefore directed to be applied in favour of the creditors of the trade.

In this case, all that was meant to be left to carry on the trade was the capital in the trade; and the executrix was not authorized in employing one shilling of the assets beyond the capital. What the executrix has employed in the trade beyond the capital was in breach of her trust. The proof must stand.

Petition dismissed.

† 7 R. R. 352.

DAVIS v. DENDY.†

(3 Maddock, 170—173.)

1818.
April 3.

Mortgagee allowed the expense of a receiver, the mortgaged property consisting of small houses at small rents, and the mortgagee living at a distance. LEACH, V.-C. [170]

A MORTGAGE of twenty leasehold houses in the parish of St. Andrew's, Holborn, for securing 250*l.* and interest, was assigned, 28th May, 1793, to a trustee for Samuel Dendy (since deceased), who resided at Dorking. In 1798 Dendy took possession, but nothing was received by the assignee of the mortgage until 1799, and the interest was not reduced by the receipts until 1809. The assignee of the mortgage died in November, 1810, and the defendants were appointed his executors. The bill was filed in January, 1813, against the representatives of the assignee of the mortgage, for a redemption and an account. The Master, in taking the account, allowed 175*l.* 13*s.* 10*d.*, paid by the assignee of the mortgage to a person for collecting the rent of these houses, being at the rate of one shilling in the pound, and also allowed 106*l.* 8*s.* 6*d.* to the defendants, the executors of the assignee of the mortgage. The Master's report was excepted to, so far as respected his allowances for the collection of the rents.

Mr. Lovat, in support of the exceptions :

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* * The trustee lived in Chancery Lane, near the houses, and might have received the rents. Since the year 1813, the executors, who are also residuary legatees, and entitled to the benefit of the mortgage, have themselves received the rents, and cannot, therefore, charge for a receiver.

Sir S. Romilly, *Mr. Bell*, and *Mr. Sugden*, *contra* : [cited *Bonithon v. Hockmore*, ‡ *Godfrey v. Watson*, § and *Langstaffe v. Fenwick*.]

† See now the Conveyancing Act, 1882, s. 19 (iii.), which however applies only when the mortgage money is due.—O. A. S.

‡ 1 Vern. 316.

§ 3 Atk. 518.

|| 8 R. R. 8 (10 Ves. 405).

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r.
DENDY.

THE VICE-CHANCELLOR :

This is a case of general importance. A mortgagee cannot be paid as a receiver, nor can he generally and universally, when he takes possession, appoint a receiver.† But if the nature of the estate be such, that great time and trouble must be sacrificed in the receipt of the rents, he may appoint a receiver.

[*173] Here the mortgagee resided at Dorking, and the mortgaged property was of such a description, that a provident owner of the estate, whose time was of value to him, would probably have thought it right to appoint a receiver. The trustee's residence is immaterial. He was not the person beneficially entitled, *nor the person to receive the rents. The charge, therefore, in respect of a receiver during the life of the assignee of the mortgage, must be allowed.

The testator died in 1810, and appointed the defendants executors and residuary legatees. The latter circumstance I lay out of the question. After the death of the assignee of the mortgage, the executors received the rents up to the year 1813, and then appointed a receiver. As the assignee of the mortgage could not have charged for a receiver if he had himself received the rents, so his executors, as long as they received the rents, can make no charge for a receiver; but they may charge from the time when they appointed a receiver. Let the deposit be divided.

One exception overruled, and the other in part allowed.

1818.
April 21.

TAYLOR AND UX. AND OTHERS v. GLANVILLE

(3 Maddock, 176—179.)

LEACH, V.-C.
[176]

A trustee is entitled to his costs, unless he acts from motives of obstinacy and caprice.

THOMAS CLARKE, who died in 1800, by his will, 2nd December, 1800, gave to Phillip Wright the sum of 100*l.*, upon trust, for the separate use of the plaintiff Melony Taylor and her children, *i.e.* the interest arising out of the same to be paid to Melony

† See note on preceding page.

Taylor yearly during her life, and after her death the principal to be divided among her children; but if plaintiff M. Taylor should have occasion for her better support, she should be at liberty to draw for any part of said 100*l.* as wanted; and he gave the residue of his property amongst certain persons, including the plaintiff M. Taylor, but her share to be for her separate use. Phillip Wright afterwards died, and the defendant was appointed executor of his will, and proved the same.

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At the testator's death, Melony Taylor had four children, the plaintiffs Elizabeth, Sarah and Mary, and a son, John Taylor. The son died, and letters of administration were granted to the plaintiff, Joseph Taylor. The daughters having attained twenty-one, expressed their desire of relinquishing their reversionary interest in favour of their mother; and in March, 1813, application was made to Flood, the attorney of the defendant, for the payment to Melony Taylor of the legacy of 100*l.* and the fourth part of the residue of the testator's effects. In January, 1815, a similar application was *made. On the 3rd Jan. 1815, the solicitors of the plaintiffs wrote to the defendant, requesting payment of the 100*l.* legacy, and the share of the residue, all parties being ready to give the necessary releases; which latter not being answered, another letter was written by such solicitors, on the 27th January following, and stating that, if a satisfactory answer was not given, a bill would be filed against the defendant. At the beginning of February, 1815, the solicitors received an answer from the defendant, saying the business should be completed as desired; but afterwards he refused to pay the money, being advised that he could not safely pay the same without the direction of the Court.

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A bill was thereupon filed against the defendant for payment of the legacy, and M. Taylor's share of the residue, and for an account, but an account was afterwards waived.

The plaintiff Melony Taylor had been paid the interest on the legacy, and on the residue, up to the filing of the bill.

The single question was, who should pay the costs of the suit?

Sir S. Romilly, and Mr. Moore, for the plaintiffs:

The defendant ought to pay the costs of the suit. He might

TAYLOR and have paid the legacy and the share of the residue to the plaintiff
 Ux. Melony Taylor, without any danger, releases being tendered by
 r. all necessary parties.
 GLANVILLE.

Mr. Hart, and Mr. Mascal, for the defendant :

[*178] The defendant thought he was not justified in paying *the legacy and the share of the residue, as the husband of Melony Taylor would then have it, contrary to the intention of the testator, who intended it for the separate use of Melony Taylor. Her consent to the payment of the money was a nullity, she being a feme covert. The defendant was right in requiring the sanction of the Court for the payment, and ought to have his costs.

THE VICE-CHANCELLOR :

The bill prays an account, but that part of the prayer is abandoned. It is a bill by *cestuis que trust* against the trustee, to have certain trust monies paid to them, and upon this the question of costs arises. The sum is small, but whether large or small the same principle must be applied.

Trustees are entitled to the protection and direction of the Court in the exercise of their trusts, and can never be called upon to pay costs, unless they refuse to act without suit merely from obstinacy and caprice. It would be against the interests of society to hold otherwise.

Evidence is admissible to shew that they have acted from obstinacy and caprice, but the circumstances of this case do not afford such evidence. Though it be true, that the defendant might safely have paid the annuity and the share of the residue, yet in refusing to do so, unless under the direction of the Court, there might be neither obstinacy nor caprice. The defendant, a trustee for this married woman, might very honestly think it wrong to pay this money, which *would go to her husband, without the sanction of the Court.

[*179]

The defendant must have his costs out of the fund.

GARDNER v. PARKER.†

(3 Maddock, 184—185.)

1818.

April 28.

LEACH, V.-C.

[184]

Gift of a bond by delivering the same, and saying, “There, take that, and keep it,” in the last sickness of the donor, he dying two days after, held to be a *donatio causâ mortis*, and donee directed to be at liberty to use the executors’ names in suing on the bond, he indemnifying them; and the costs of the suit to be paid out of the testator’s estate.

RICHARD CROSSLEY being on terms of intimacy with the plaintiff (who had rendered the deceased various services), and being seriously ill, and confined to his bed, two days before his death, in the presence of a servant, gave the plaintiff a bond for 1,800*l.*, saying, at the same time, “There, take that, and keep it.” The defendants were the executors of Crossley, and the prayer of the bill was, that the plaintiff might be declared entitled to the bond; and that the defendants might be decreed to execute proper instruments to enable the plaintiff to recover and receive the money due on the bond; and that the plaintiff might be at liberty to make use of the names of the defendants in any action to be brought against the obligors, the plaintiff offering to indemnify the defendants against all costs.

Sir Samuel Romilly, and *Mr. Roupell*, for the plaintiff.

[185]

Mr. Cooke, *contra* :

This cannot be considered as a gift or a *donatio causâ mortis*. It was not given in contemplation of immediate death. *Bunn v. Markham*.‡ No property could pass by the delivery of the bond, it being a chose in action.

THE VICE-CHANCELLOR :

The case of *Snellgrove v. Bailey* § has established, that there

† Since the transfer of a debt may now be legally completed by an assignment in writing under the Judicature Act, 1873, s. 25 (6), the question here determined now assumes a somewhat different aspect, for the old cases leave it still doubtful whether incorporeal property, which is capable of such assignment, can be made the subject of a *donatio*

mortis causâ by the mere delivery of a document which is not a negotiable instrument (see *Ward v. Turner*, 2 Ves. Sen. 431, cited by V.-C. Hall in *Moore v. Moore*, L. R. 18 Eq. at p. 463).—O. A. S.

‡ 17 R. R. 497 (7 Taunt. 224, 2 Marsh. 532, Holt, N. P. 351).

§ 3 Atk. 214.

GARDNER
v.
PARKER. may be a *donatio mortis causæ* of a bond, though not of a simple contract debt, nor by the delivery of a mere symbol. The doubt here is, that the donor has not expressed that the bond was to be returned if he recovered. This bond was given in the extremity of sickness, and in contemplation of death; and as it is to be inferred, that it was the intention of the donor that it should be held as a gift only in case of his death. If a gift is made in expectation of death, there is an implied condition that it is to be held only in the event of death. The cases of *Lawson v. Lawson*,† *Miller v. Miller*,‡ and *Jones v. Selby*,§ furnish this rule. Let it be declared that the plaintiff is entitled to this bond as a *donatio mortis causæ*; and that, indemnifying the executors, he is at liberty to sue in their names; and let the

Costs be paid out of the testator's estate.

1818.
April 8.

FILDES v. HOOKER.

(3 Maddock, 193—195.)

LEACH, V.-C.
[198]

A purchaser cannot be compelled to accept a defective title with an indemnity against the defect, unless such defect consists of a definite pecuniary liability against which the proposed indemnity will be a complete protection.

[THIS was a vendor's suit for specific performance of an agreement to purchase certain leasehold premises. The Master had reported in favour of the title.]

It having been referred back to the Master to review his report; the Master, by his reviewed report, stated, that objections having been made before him, on the part of the defendant, that the premises were by former leases made subject to covenants for rents, and otherwise, to which it is alleged the premises still remain liable; he was of opinion, that upon the plaintiff indemnifying the defendant against the performance of any covenants which may have been entered into by the plaintiff, or any former lessees of the premises, for payment of any rents,

† 1 P. Wms. 441.

§ Prec. Ch. 300.

‡ 3 P. Wms. 358.

or otherwise, in respect of the premises, the plaintiff can make a good title to *the premises upon a lease for the term of twenty-one years, according to the agreement.

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v.
HOOKER.
[*194]

This report was excepted to.

Mr. Sugden in support of the exceptions.

Mr. Roupell, and *Mr. Preston*, *contrà*.

THE VICE-CHANCELLOR :

The plaintiff comes to this Court to compel the specific performance of a contract, by which the defendant engages to accept from him a lease of the premises in question for twenty-one years. He can have no title to the assistance of the Court unless he is able to perform the agreement on his part—unless he is able to give to the defendant a secure lease for the term of twenty-one years. It appears that the house in question is one of the six houses built on ground demised by the Skinners Company to Mr. Burton, for a term of ninety-nine years from Michaelmas, 1807, at a ground-rent of 10*l.*; and in that lease is contained a proviso for re-entry upon non-performance of any of the covenants contained in it.

The plaintiff is now in possession by an assignment of an underlease, granted by Mr. Burton, of this particular house. This underlease contains all the covenants which are included in the original lease; but it is obvious that the observance of these covenants by the holder of this underlease cannot alone protect his possession.

If this defendant were to accept the lease contracted for from the plaintiff, and the covenants in the original *lease, though well observed with respect to this particular house, were to be broken as to any other of the five houses, the Skinners Company would be entitled to re-enter, not only upon that particular house, but upon the whole property comprised in the original lease, and, consequently, upon the premises in question.

[*195]

The plaintiff is necessarily, therefore, driven to admit that he cannot give to the defendant a secure lease for the term of his contract, but the Master has considered that the offer of the

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v.
HOOKER.

plaintiff to indemnify the defendant in case of his eviction, is equivalent to a secure title. I cannot bring myself to that opinion. Where a good title can be made, subject to a pecuniary charge, a court of equity has compelled a specific performance of the contract upon security against the charge. Even that principle might have been questionable, as imposing, at all events, a considerable degree of trouble upon a purchaser, to which he had not subjected himself by the terms of his contract. But there, the purchaser is effectually protected in the possession of the specific subject of his contract. Here, the plaintiff admits that he cannot protect the defendant in the specific subject of his contract; and only proposes, in effect, to secure to him a pecuniary compensation for the value, in case he loses that possession. A court of equity has never acted upon such a principle. A vendor cannot be aided here who is not able to secure to the purchaser the specific property for which he has contracted.

Exceptions allowed.

1818.
May 7.

EYRE v. BARTROP.†

(3 Maddock, 221—225.)

[221]

By giving time to the principal, the grantee of an annuity exonerates the surety from past, as well as future, arrears.

IN 1809, E. V. Eyre, the brother of the plaintiff, granted an annuity to R. B. Skurray and R. Skurray, of 21*l.* 14*s.* during his life, and the plaintiff joined with him in the grant, as a surety, for the payment of the same quarterly. In the annuity deed it was provided, that E. V. Eyre, or the plaintiff, should, on seven days' notice, be at liberty to redeem the annuity on the payment of 1,384*l.* 8*s.* 6*d.*, which was something more than the purchase money. The annuity was farther secured by demise to W. H. Skurray, a trustee, for ninety-nine years, of certain real property, by E. V. Eyre, and a bond and judgment of E. V. Eyre and the plaintiff.

† Referred to by Bramwell, J.A., *Co. v. Dickinson* (1876) 21 C. P. Div. and Amphlett, J.A., *Croydon Gas* at pp. 51, 52.

Some time after, this annuity was, by deed, 12th January, 1810, assigned by R. B. Skurray, and R. Skurray, to the defendant, together with the benefit of the securities, and the defendant entered into a new agreement with E. V. Eyre;—and by indenture, 12th January, 1810, reciting the before-mentioned grant of the annuity; and also another indenture, 22nd July, 1812, under which the defendant was entitled to another annuity of 125*l.* granted by E. V. Eyre; and after reciting that all arrears of the annuities had been paid, and that defendant was willing, and had consented, to allow to said E. V. Eyre new and more advantageous terms of re-purchasing said first-mentioned annuity, and also the subsequent annuity;—the Skurrays, with the privity *of E. V. Eyre, who was a party to the deed, assigned the annuity of 217*l.*, and the securities, to the defendant, and a new trustee of the defendant's, subject to such right of re-purchase as was reserved in the grant of that annuity; “and it was thereby declared and agreed, by and between defendant and E. V. Eyre, his heirs, &c. that defendant, his heirs, &c. shall not, nor will, at any time thereafter, until the expiration of five years from the date of the deed, or until the death of Edward Eyre, the father of E. V. Eyre, (which should first happen), demand or sue for either of the said annuities of 217*l.* 14*s.* and 125*l.*, or any part thereof, or for any payment for or on account of either of the said annuities;” and it was farther agreed that the said annuities should, on certain conditions, be redeemable by E. V. Eyre, on more favourable terms than those originally stipulated for in the grants of the annuities.

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v.
BARTROP.

[*222]

Edward Eyre the father survived the five years, and was living, and the annuities were not redeemed, or the arrears paid to the defendant.

E. V. Eyre being pressed for the arrears of the annuity, the defendant, by agreement, 23rd February, 1815, consented to receive them by instalments; the payment of them to be secured by a judgment acknowledged by E. V. Eyre.

The plaintiff was not a party to the deed of the 12th January, 1810, nor concurred in its provisions; nor was he a party to the agreement of the 23rd February, 1815.

EYRE
v.
BARTROP.
[223]

The instalments not being paid, the plaintiff was called upon to pay the arrears of the first-mentioned annuity, and the defendant threatened to take out execution against him upon the judgment; but the plaintiff contended, that in consequence of the deed of January, 1810, and the agreement in 1815, he, as surety, was discharged.

The prayer of the bill was, that it might be declared that the plaintiff, as a surety for the payment of the annuity according to the terms of the indenture of the 1st May, 1809, became released and discharged therefrom by the effect of the subsequent dealings and transactions between the defendant and E. V. Eyre respecting the same; and that the defendant might be restrained from issuing execution on the judgment, and from commencing an action, &c. or from otherwise proceeding in respect of the said annuity.

An injunction was obtained, for want of an answer, until farther order.

A motion was now made to dissolve the injunction upon the coming in of the answer.

The answer admitted the facts stated in the bill, except that it did not admit that the plaintiff was a surety only; but notice was given to produce the original deed, on the face of which it appeared he was only a surety.

Mr. Bell, and Mr. Wilbraham, in support of the motion :

[*224] The plaintiff is a mere surety, and the effect of giving time to the principal, without the consent of the surety, *has exonerated him from all claims in respect of past or future arrears of the annuity. They cited *Rees v. Berrington*,† and *Richard Burke's* case,‡ who was a co-surety for an annuity; when it was held, that the grantee, having given time to the principal, could make no demand against the surety.

Sir S. Romilly, and Mr. Treslove, contra :

It may be admitted as a general rule, that time given to the

† 3 R. R. 3 (2 Ves. J. 540); and see *Ex parte Gifford*, 6 R. R. 53, 57 (6 Ves. 805, 809).

‡ Cited by Lord Eldon in *English v. Darley*, 5 R. R. 543, 544 (2 Bos. & P. 62).

principal discharges the surety, but it only discharges him in respect of what accrues during the time given to the principal.

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BARTROP.

* * Suppose two, one as surety, enter into a bond for the payment of the principal sum in two years, with interest in the mean time, and the obligee afterwards agrees not to call for the interest until the end of two years: this agreement would exonerate the surety from the payment of the *interest, but as to the principal, he would not be discharged. It is a legal question, and the plaintiff should be left to his remedy by defence at law.

[*225]

THE VICE-CHANCELLOR:

The defendant is proceeding to execution upon the judgment, and the plaintiff comes here for equitable relief. It could not be denied, that if by any arrangement between the creditor and the debtor, the situation of the surety is altered, that he is thereby discharged; but it is said, that the situation of the surety is here only partially altered during the five years; and that in respect of subsequent payments it remains the same. I am of opinion, however, that the deed of January, 1810, and the agreement of February, 1815, and the change in the terms of the redemption, have either directly, or by their consequences, wholly altered the situation of the surety, and that he is thereby wholly discharged.

Motion refused.

GELL v. WATSON.

(3 Maddock, 225—227.)

1818.

May 7.

A purchaser in possession making improvements, &c., but objecting to the title, not obliged to pay purchase money into Court.

LEACH, V.-C.

[225]

THIS was a motion made on the part of the plaintiff, that the defendant might pay into Court the sum of 14,399*l.* 1*s.* 2*d.*, the remainder of his purchase money for an estate he had agreed to purchase of the plaintiff for 18,000*l.* The agreement for the purchase was in December, 1809, and 1,800*l.*, part of the

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v.
WATSON.
[*226]

purchase money, was to be paid on or before February, 1810, and the remainder of the purchase money on or before the 20th *November following; and it was agreed the defendant should have possession on the 25th March, 1810. It was also agreed the timber should be valued and paid for. The defendant paid 3,600*l.* in part payment of the purchase money, and also the sum of 1,000*l.* on account of the timber. An abstract of the title was delivered to the defendant, which was objected to, but the defendant entered into possession of the estate on the 25th March, 1810, and made alterations, pulling down buildings, and erecting others, and permitted a turnpike road to be made through the estate; and agreed to sell part of the estate, and received part of the purchase money. A bill was filed by the plaintiff for a specific performance of the agreement, which was answered by the defendant. The title was not rendered complete until an Act of Parliament was obtained in 1817.

Sir S. Romilly, and Mr. Sugden, in support of the motion:

By the alterations on the estate, and the agreement to re-sell part, the defendant is, according to *Cutler v. Simons*,† bound to pay in the residue of his purchase money. By re-selling, the plaintiff is under the necessity of making such new purchaser a party to the suit: under these circumstances, and after such a length of possession, it is but reasonable that the defendant should pay in the residue of his purchase money.

Mr. Bell, contrà:

[*227] The defendant was desirous of completing the purchase, but the abstract did not show a clear title. In *1817, an Act was obtained to enable them to complete the title. Whether the title is now complete, will be seen when the Master has made his report. At present the defendant ought not to pay in the residue of his purchase money.

THE VICE-CHANCELLOR:

Here the possession was according to the agreement, and the

† 16 R. R. 131 (2 Mer. 103).

length of possession without payment of the residue of the purchase money is sufficiently accounted for, the defendant not having been able to obtain a good title to his purchase. The Act of Parliament to complete the title was obtained after the bill was filed. The defendant insists that the improvements on the estate, and the contract to sell part, are not, under the special circumstances, to be construed as an acceptance of the title, and he is fortified in this defence, by the plaintiff having thought it necessary on his part to obtain the Act of Parliament. Without impeaching, therefore, the case cited, I think this motion cannot be granted.

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v.
WATSON.

Motion refused, without costs.

EX PARTE JANSON, IN RE CORF.†

(3 Maddock, 229—231.)

1818
May 19, 25.

Even in the absence of joint estate the joint creditors cannot prove against the separate estate of an individual bankrupt partner unless there is no available remedy against any other joint debtor.

LEACH, V.-C.
[229]

THE petition stated that, on the 11th May, 1811, a commission issued against Corf, and assignees were chosen: that previous to his bankruptcy he carried on business in co-partnership with Deveryhouse, which partnership was dissolved in 1807; and by indenture, dated 1st August, 1807, Deveryhouse assigned to Corf the stock in trade, debts, and effects of Deveryhouse, jointly with Corf, in trust, to apply the same in discharge of the debts and engagements of Corf and Deveryhouse jointly, and if a surplus, to divide it between them. Corf took possession of the joint estate and effects, disposed of the same, and as far as he was able, and with other means, paid debts to a greater amount than the property got in, and several of the joint debts remained undischarged at the bankruptcy of Corf; and at the time of issuing the commission against Corf, there was no available joint estate

† See now the Bankruptcy Act, 1883, s. 59(1).—O. A. S.

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JANSON,
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CORP.

[*250]

and effects of the bankrupt and Deveryhouse:—That there is remaining in the hands of the assignees of Corf (after payment to his separate creditors of two several dividends of 1*s.* in the pound, ordered under the commission), sufficient to pay the petitioner, and the rest of the unpaid creditors of the co-partnership, proved under the commission, 2*s.* in the pound on their debts:—That the petitioner, and others, have proved debts under the commission, as owing to them from the bankrupt, and Deveryhouse, on the co-partnership account; and at a meeting of the Commissioners, *the petitioner claimed to be entitled, under the circumstances before stated, to a dividend in respect of his joint debt, out of the separate effects of Corf; but the Commissioners refused to make such dividend, on the ground that, though Deveryhouse was alleged to be insolvent, he had not been declared a bankrupt. The prayer of the petition was, that the Commissioners might be directed to order a dividend, of the remaining estate and effects of the bankrupt, to be made amongst the joint creditors of the bankrupt and Deveryhouse, who have proved, or shall prove, debts under the commission, from and out of the separate estate and effects of the bankrupt, equally with the separate creditors of the bankrupt; and also the costs of the application.

The *Solicitor-General*, in support of the petition :

There is no case exactly in point. It has been held, that a joint creditor of a partnership which has ceased, may be admitted to prove, under a subsequent commission, against one of the *quondam* partners, where there were no joint effects, and the other partner was a bankrupt; and the insolvency of the partner seems equivalent to his bankruptcy.

Mr. Cullen, contra :

Insolvency is not equivalent to bankruptcy. In the former case he may be able to pay something, perhaps the greater part of the debt; but if a bankrupt, there can be nothing to pay in respect of the joint debts. Here it does not appear, as in the case of bankruptcy, that there is no joint estate which can be rendered available for the payment of the petitioner.

THE VICE-CHANCELLOR :

Though a person may be insolvent, he may yet be able to pay a considerable part of his debts, for insolvency means only that the party is unable to pay all his debts, but in case of bankruptcy, his whole property is absorbed by the commission : the effect, therefore, of insolvency and bankruptcy is different ; in the latter case there can be no other fund than the separate estate ; in the former there may. As, however, this is a new and important question, I shall communicate with the Lord Chancellor on the subject.

Ex parte
JANSON,
In re
CORP.
[231]

THE VICE-CHANCELLOR :

May 25.

I mentioned this case to the LORD CHANCELLOR, and he concurs with me in opinion, that the mere insolvency of the co-partner does not, as his bankruptcy would do, entitle the joint creditors to prove upon the separate estate of the bankrupt partner ; the principle being, that whilst there is any other fund, however small, to resort to, the joint creditors cannot prove against the separate estate of one of the partners who has become bankrupt.

SHELLY v. NASH. †

(3 Maddock, 232—236.)

1818.
May 28.

A sale of a reversion by public auction held good, and the purchaser not bound to shew he has given the full value.

LEACH, V.-C.
[232]

THE material facts in this cause, as they appeared on the pleadings, were, that the defendants, in consequence of an advertisement in the public papers, of a sale, 4th March, 1814, by public auction, at Garraway's, of a reversion of 8,000*l.*, secured on freehold property, attended the sale, at which time printed particulars were distributed as follow : " The reversion of 8,000*l.* sterling, to be most amply secured upon valuable free-

† See now 31 Vict. c. 4, and the *land v. De Faria*, 11 R. R. 9.—cases referred to in the note to *Gow*—O. A. S.

SHELLY
v.
NASH.

hold property, and made payable at the decease of the survivor of two gentlemen, one (the grandfather of the plaintiff), between eighty and ninety, and the other (the father of the plaintiff) upwards of sixty years of age, in case they are both survived by a gentleman in his twenty-second year."

The defendants were declared the highest bidders, at the sum of 2,593*l.* 10*s.*, and paid a deposit of 519*l.* and signed an agreement for the purchase.

The defendants, previous to the purchase, had no knowledge of the plaintiff, or his circumstances, nor even knew the name of the vendor, until they applied for an abstract of the title to the reversion on which the money was to be secured.

On the 6th July, 1814, the purchase money was paid, and the securities executed.

The grandfather of the plaintiff died 6th January, 1815.

[233]

By the evidence of Morgan, the actuary of the Equitable Assurance Office, he stated, that 3,540*l.*, or thereabouts, was the fair value of the reversionary interest of 8,000*l.* on the before-mentioned contingency; and that only 5,860*l.* ought to have been secured to be paid upon the happening of the contingency, in consideration of the sum of 2,593*l.* 10*s.*

Frend, the actuary of the Rock Life Insurance Office, by his evidence, stated, that 3,653*l.* was the fair price of the contingency; * * *

[*284]

The object of the bill was to get the plaintiff released *from the grant, on payment of the principal money advanced at 5*l.* per cent., it being a sale for an inadequate consideration of a reversion by an expectant heir, only twenty-two years of age, and in distress.

Mr. Hart, and *Mr. Wingfield*, in support of the bill:

It is clear that a grant by private contract of a reversionary interest, by an expectant heir, cannot be sustained, but that the vendor will be relieved in this Court on the payment of principal, interest, and costs, the purchaser being considered as a mortgagee. *Peacock v. Evans*,† *Gowland v. De Faria*.‡ Will then

† 10 R. R. 218 (16 Ves. 512).

‡ 11 R. R. 9 (17 Ves. 20).

the circumstance of its being a sale by public auction make any difference? It is apprehended not. * * *It is in proof, in this case, that an adequate consideration was not paid. In both those cases the purchasers acted *bonâ fide*; there was no imputation of fraud, but still the principle was applied. * * *

SHELLY
v.
NASH.

[*235]

Sir S. Romilly, and *Mr. Phillimore*, for the defendants, were stopped by

THE VICE-CHANCELLOR:

This is an important question; it has often occupied my attention, and so fixed are my sentiments on the subject, that it is unnecessary to delay the expression of my opinion.

At law, and in equity also, generally speaking, a man who has a power of disposition over his property, whether he sells to relieve his necessities or to provide for the convenience of his family, cannot avoid his contract upon the mere ground of inadequacy of price. A court of equity, however, will relieve expectant heirs and reversioners from disadvantageous bargains. In the earlier cases it was held necessary to shew that undue advantage was actually taken of the situation of such persons; but in more modern times it has been considered, not only that those who were dealing for their expectations, but those who were dealing for *vested reversions also, were so exposed to imposition and hard terms, and so much in the power of those with whom they contracted, that it was a fit rule of policy, to impose upon all who dealt with expectant heirs and reversioners, the *onus* of proving that they had paid a fair price, and otherwise to undo their bargains, and compel a re-conveyance of the property purchased. The principle and the policy of the rule may be both equally questionable. Sellers of reversions are not necessarily in the power of those with whom they contract, and are not necessarily exposed to imposition and hard terms; and persons who sell their expectations and reversions from the pressure of distress, are thrown, by the rule, into the hands of those who are likely to take advantage of their situation; for no person can securely deal with them. The principle of the rule,

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SHELLY
v.
NASH.

however, cannot be applied to sales of reversion by auction. There being no treaty between vendor and purchaser, there can be no opportunity for fraud or imposition on the part of the purchaser. The vendor is, in no sense, in the power of the purchaser. The sale by auction is evidence of the market price. Being of this opinion, it is unnecessary for me to enter into a consideration of the evidence as to the inadequacy or adequacy of the price. It is said, that pretended sales by auction may be used to cover private bargains; where such cases occur they will operate nothing.

Bill dismissed with costs.

1818.
June 22.

WALKER v. BARNES.

(3 Maddock, 247—250.)

LEACH, V.-C.

[247]

The vendor of an estate having lost his title deeds, agreed to give the vendee a real security against such loss.

The vendee, on a bill for a specific performance of the agreement, stated he had not real property sufficient for such security, but offered ample personal security.

Held, the vendor was bound to procure a sufficient real security.

THE defendant Barnes, pretending to be seised in fee of a wharf at Brigbrook, on the 18th January, 1809, agreed to sell the same to the plaintiff for 650*l.*, and by indentures of lease and release, 4th and 5th Sept. 1809, conveyed the wharf to the plaintiff, his heirs and assigns for ever.

At the time the purchase money was paid, the defendant alleged that the conveyance to him of the wharf and premises, as well as the title deeds, were mislaid, and could not be found; and thereupon a bond of indemnity, dated the 5th Sept. 1809, was entered into by the defendant, in the penalty of 1,300*l.*, in order to save harmless the plaintiff; and it was agreed that in the mean time, and until the conveyance and title deeds of the wharf could be found, the sum of 650*l.* should be placed in the hands of Phillip Box, of Buckingham, banker, since deceased, in trust for the plaintiff.

On the 5th Sept. 1809, the plaintiff deposited the purchase money in the hands of Phillip Box, who gave a receipt for the same, wherein it was stated, that the money had been lodged with him by the mutual directions of the plaintiff and defendant, there to remain as an indemnity for the plaintiff, against all persons whomsoever who may set up any claim to the premises, in anywise howsoever, in consequence of the conveyance thereof to the defendant being lost or mislaid, or not delivered up to the plaintiff, or until the defendant should give a real security of double the value for such indemnity, which real security was to be given within six months from the date of the receipt, if the deeds were not then found, and may be changed from time to time, at the will of the defendant, for any other of equal value; and in the mean time the said Phillip Box agreed to pay to the defendant interest on the said 650*l.* at four per-cent.; and both the plaintiff and defendant signed their consent thereto at the foot of the receipt, which was deposited with a third person, with the consent and on the behalf of all parties.

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v.
BARNES.
[248]

Upwards of five years elapsed since the purchase money was paid into the hands of Box, who died in 1811, and the purchase money continued in the hands of his executors, who were willing to pay the same as the plaintiff and defendant should mutually direct.

The plaintiff by his bill, stating these facts, prayed, that the defendant might be decreed specifically to perform his agreement, and to deliver up the conveyance to him of the wharf, and the title deeds relating thereto; or, in case the same could not be found, that *the defendant might be decreed to give to the plaintiff a full and sufficient security, charged upon real estates of the defendant, until the same could be found.

[*249]

The defendant by his answer admitted the statements in the bill;—stated his endeavours to recover the lost deeds; his readiness to give a full and complete indemnity; but his inability to give a real security, he not being seised or possessed of sufficient freehold estates for that purpose; and insisted, that a security in personal estates of equal value with the wharf, ought to be received.

WALKER After the original bill was instituted the plaintiff died, and a
 v.
 BARNES bill of revivor was filed by his executors.

Sir Samuel Romilly, for the plaintiffs, contended that the defendant was bound to give a real security, and that if he had no estates, he must, for that purpose, purchase some.

Mr. Hart, and *Mr. Raithby*, for the defendants, insisted, that as the defendant had no real estate, he could not perform his agreement, and that the plaintiffs ought to be satisfied with personal security. They cited *Howell v. George*.†

THE VICE-CHANCELLOR :

[250] If a man agrees to give a real security for a demand, he may be obliged specifically to perform his agreement, though he has no real estate, because he may procure it. It might be different where he agrees to give a security on an estate called A., of which he is not *the owner, because he may be unable to procure that very estate; but where, as in this case, he agrees to give a real security, generally, he has all the world before him, and must therefore purchase an estate to enable him to perform his agreement. In the common case of a husband, on marriage, covenanting to settle a real estate of a particular value on his wife and the issue of the marriage, if the husband has no real estate to settle, he is compellable to procure one.

*Specific performance decreed, with costs of original bill,
 but not the costs of the bill of revivor.*

† 15 E. R. 203 (1 Madd. 1).

WETHERELL v. COLLINS.

(3 Maddock, 255.)

1818.

June 26.

A mortgagor filing a bill to redeem, must pay the costs of persons, defendants, claiming under the mortgagee.

LEACH, V.-C.

[255]

THIS was a bill by a mortgagor for redemption of mortgaged premises. The mortgagee had assigned the mortgage upon certain trusts for the benefit of his family. The mortgagee, the trustees, and the *cestuis que trust* were all made parties defendants; and, upon the hearing, a question was made as to the costs of the trustees and *cestuis que trust*, which the plaintiff urged he ought not to pay, because they were necessary parties to the suit, not by his act, but by the act of the mortgagee.

THE VICE-CHANCELLOR :

It seems at first sight a great hardship that the mortgagor is to pay the costs of persons claiming under the mortgagee, and made necessary parties by his act, but it is the constant course of the Court, and it is to be supported upon this principle,—that at law, after a mortgage is forfeited, the estate is the absolute property of the mortgagee, and he may deal with it as his own; and that if the mortgagor comes for the redemption which the equity of this Court gives him, it must be upon the terms of indemnifying the mortgagee from all costs arising out of his legal acts.

1818.

June 27.AISLABIE *v.* RICE.

(3 Maddock, 256—261; 8 Taunton, 459—467.)

LEACH, V.-C.

[256]

Devise and bequest of lands and furniture to A. H. testator's wife, for life, and after her death, to H. L. and her assigns, for life, in case she continued single and unmarried; and after her decease, unto such persons as she should by deed or will appoint, and for want of appointment, to A. L. and to M. L. their heirs, &c. as tenants in common; but in case the said H. L. should marry in the life-time of A. H., and with her consent, or after her death, with the consent of J. T. and T. L., or the survivor (signified in writing), then H. L. and her assigns should enjoy the lands and furniture in the same manner she would have done if she had continued single and unmarried.

A. H., the testator's wife, and also J. T. and T. L. died. H. L. took possession of the estate, and married. Held, that H. L. took an estate for life, with a power of appointment, subject as to her life estate only in the event of her marriage to a condition subsequent; and as the compliance with it became impossible by the act of God, her estate for life became absolute, and she might execute the power of appointment.

Specific performance decreed against a purchaser of the fee from H. L., but without costs, a fair objection having been made to the title.

MICHAEL HATTON, by his will, 14th February, 1771, after devising all his estates to and for the use of Alice Hatton, his wife, for her life, devised and bequeathed his estate, manor, and mansion house of Dane Court, with all its lands, hereditaments and appurtenances, and various articles at, in and about the same, unto and for the use and benefit of the plaintiff, under her then maiden name of Hannah Lilly, in the following words:—

“And as concerning the said above excepted manor or lordship of Dane Court, with the manor and mansion house called Dane Court, and the several houses, lands and appurtenances thereunto belonging, and also my plate, china and furniture, goods, horses, cattle, carriages and husbandry tackle, which shall be in my said house and appurtenances at the time of my decease, I give, devise, and bequeath the *same, and every part thereof, unto the said Hannah Lilly and her assigns, for and during the term of her natural life, in case she shall continue single and unmarried; and from and after her decease, I give, devise, and bequeath the same manor or lordship of Dane Court, with the manor and mansion house called Dane Court, and the several houses, lands, and appurtenances thereunto belonging, and also

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the said plate, china, furniture, goods, horses, cattle, carriages and husbandry tackle, unto such person or persons, and in such shares and proportions, and in such manner and form, as the said Hannah Lilly shall, by any deed or deeds, writing or writings, or by her last will and testament in writing, signed and executed in the presence of three or more credible witnesses, direct, limit or appoint; and for want of such direction, limitation or appointment, then I give, devise, and bequeath the same and every part thereof unto the said Alice Lilly and Mary Lilly, and their heirs, executors, administrators and assigns, to be equally divided amongst them, share and share alike, as tenants in common, and not as joint tenants. But in case the said Hannah Lilly shall marry in the life-time of my said wife, and with her consent and approbation, or, after the death of my said wife, with the consent and approbation of James Fierney, of London, merchant, and Thomas Lilly, of London, merchant, or the survivor of them, such consent and approbation to be signified in writing under his, her or their hand or hands; then and in either of the said cases, as the event shall be, it is my will and mind, and I do hereby order and direct, that the said Hannah Lilly and her assigns, shall have and enjoy the said manor of Dane Court, with the houses, lands and appurtenances thereunto *belonging, and also the said plate, china, and other effects, in the same manner as she could have done if she had continued single and unmarried."

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RICH.

[*258]

The testator died in 1776, and his will was proved on the 15th August in that year.

Alice Hatton survived the testator, and died in December, 1791. On her decease, the plaintiff entered into possession of the premises at Dane Court, with the appurtenances, and continued ever since to have such possession.

James Fierney and Thomas Lilly died many years ago, and whilst the plaintiff remained unmarried. In February, 1795, the plaintiff married Rawson Aislabie, who died in January, 1806.

The plaintiff, 10th June, 1815, entered into a written agreement with the defendant, to sell to the defendant her life estate and interest, and to appoint all and singular the hereditaments

AI SLABIE and premises to the defendant, or as he should direct in fee
v. simple, for the price of 11,000*l*.
RICE.

The defendant objecting to the title, this bill was filed, for a specific performance of the agreement.

[*259] The defendant, by his answer, submitted, whether the power of limitation and appointment given to the plaintiff under the will, was to be considered as a springing use, or an executory devise, or partaking of the nature thereof, or otherwise as a mere power to appoint by way of a strict contingent remainder, and *how far the power to appoint, given by the will, under whatever denomination it might be classed, became an absolute vested right, or enabled the plaintiff to execute the same by way of a remainder immediately expectant in her life-time; and whether the particular estate for life of the plaintiff did not determine, in point of law, by her marriage without the consent in writing of the several persons in the will and bill named; and if it did so determine, whether the plaintiff's power of appointment was or was not destroyed thereby, as in strictness thereupon dependent.

The cause came on to be heard before His Honor the late MASTER OF THE ROLLS,† 31st May, 1816, who directed a case should be made for the opinion of the Court of Common Pleas, and the question was to be—what estate, right, and interest the plaintiff took in the real estates at Dane Court under the will of Michael Hatton, and what estate, right, and interest she then had therein? And his Honor reserved the consideration of all further directions, and of the costs, till after the Judges had made their certificate.

[*260] The case was in consequence, twice argued before the Court of Common Pleas, and the Judges returned the following certificate: —“We have heard this case argued, and have considered it. We are of opinion, that Hannah Lilly, now Hannah Aislalie, took under the above will, an estate for life, with a power of appointment unto such person or persons, and in such shares and proportions, and in such manner and form, as she should by any deed or deeds, writing or writings, *or by her last will in writing, signed and executed in the presence of three or

† Sir Wm. Grant.

more credible witnesses, direct, limit and appoint; subject nevertheless as, to her life estate only, to the condition of her remaining sole and unmarried, which condition was qualified by the proviso, that a marriage with the consent and approbation of Alice Hatton, the wife of the devisor, in her life-time, or after her death, of James Fierney and Thomas Lilly, signified in the manner expressed in the said will, should not determine her life estate.

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“We are of opinion, that this condition was a condition subsequent; and that as the compliance with it was by the death of Alice Hatton, and James Fierney and Thomas Lilly, before the marriage of Hannah Lilly, become impossible, by the act of God, her estate for life is become absolute; and that she may now execute the power of appointment of the real estates at Dane Court, in the manner and form directed by the above will.

“V. GIBBS,

“R. DALLAS,

“JA. PARK,

“J. BURROUGH.”

The cause now came on for further directions, and upon the production of this certificate, the VICE-CHANCELLOR directed a specific performance of the agreement.

It was then urged, that the purchaser ought to pay the costs of the suit, his objections to the title not being sustained; but the VICE-CHANCELLOR said, wherever *there was a fair objection to a title, a purchaser, though he fails in his objection, being justified in taking the opinion of the Court upon it, ought not to pay costs.

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The decree therefore was for the plaintiff, but without costs.

1818.
June 29.

TOWNSHEND AND ANOTHER v. WILSON.

(3 Maddock, 261—272.)

LEACH, V.-C.
[261]

A power of sale given to three trustees, held not to be well executed by two surviving trustees.

A REPORT of the decision in this case at Common Law (1 B. & Ald. 608) will be found in 19 R. R.

1818.
July 17.

JOHNSON v. LEGARD.†

(3 Maddock, 283—302.)

[283]

Limitations in a marriage settlement to the brothers of the settlor, are *prima facie* voluntary and voidable under 27 Eliz. c. 4.

THIS case was reversed on appeal by Lord ELDON, L. C. as reported in Turner & Russell, 281, upon grounds which do not appear in the report in 3 Maddock. Such reversal however did not imply any doubt or question by the Lord CHANCELLOR as to the accuracy of the proposition stated in the above head note, which embodies the opinion of the Judges upon a case stated in this cause by the direction of THE MASTER OF THE ROLLS. The case is reported at Common Law in 6 M. & S. 60, see *post*, p. 301.—O. A. S.

1818.

CLAYTON v. EARL WINTON.‡

(3 Maddock, 302, n.—303, n.)

[302, n.]

Limitations in a marriage settlement in favour of the issue of a second marriage by the settlor, held good against a purchaser for a valuable consideration; such limitations being interposed between the limitations to the sons of the first marriage and the daughters of such.

[THE following report of this case is taken from a note to *Johnson v. Legard*, 3 Maddock at p. 302.]

In a cause of *Clayton v. Earl Winton*, the following case was

† *De Mestre v. West*, '91, A. C. 264, 60 L. J. P. C. 66, and see next case.

‡ *Mackie v. Herbertson* (1884) 9

App. Ca. 303, and see the note on the preceding case of *Johnson v. Legard*.

sent for the opinion of the Judges of the Court of King's Bench :—

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TON.

“ The plaintiff, being seised in fee simple of several freehold estates of inheritance comprised in the deeds of settlement after mentioned, previously to, and in contemplation of, his marriage with Susan Nuttall, his late wife, now deceased, by indentures of lease and release, or marriage settlement, bearing date the 28th and 29th days of November, 1788, and made between the plaintiff Thomas Clayton, of the first part; Susan Nuttall, spinster, of the second part; the Right Honourable Lord Grey, Baron Grey de Wilton, and Charles Townley, of the third part; and Rundall Andrews, and Thomas Whitehead, of the fourth part; after reciting, that the said Susan Nuttall was possessed of, interested in, and entitled unto, a portion or fortune consisting of several sums of money, placed out at interest, to several persons, upon several mortgages, taken for the same in her own name, and in the names of the executors named in the will of her late father during her minority, whereupon there was due for principal money and interest, the sum of 7,000*l.* and upwards, and that a marriage by God's permission, was intended shortly to be had and solemnized between the said Thomas Clayton and Susan Nuttall; and upon the treaty thereof, it had been proposed and agreed, that in case the said intended marriage *took effect, the portion or fortune to which the said Susan Nuttall was interested in, or entitled unto, as aforesaid, should be paid and applied in or towards discharging certain sums of 10,073*l.* therein mentioned, which were good charges in equity upon the said estates of the said plaintiff; and that it had been agreed, that the same hereditaments and premises should be settled, limited, and assured to, for and upon such uses, trusts, intents and purposes, and under and subject to such powers, provisoes, conditions, limitations and agreements, as were thereinafter thereof limited, expressed and declared; it is witnessed, that in consideration of the said intended marriage and of the portion or fortune of the said Susan Nuttall being paid and applied to and for such uses, intents and purposes as thereinbefore mentioned, and for the making a competent jointure for her the said Susan Nuttall, in case the said

[*303, n.]

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intended marriage should take effect, and she should survive the said Thomas Clayton, and also a provision of portions and maintenance for the issue of the said intended marriage, and for settling and assuring the said hereditaments and premises to, for and upon such uses, trusts, intents and purposes, and under and subject to such powers, provisoes, conditions, limitations and agreements as are thereafter mentioned, and in consideration of the sum of 10*l.* of lawful money of Great Britain by the said Lord Grey, Baron Grey de Wilton, Charles Townley, Rundall Andrews, and Thomas Whitehead, to the said Thomas Clayton in hand well and truly paid, the receipt whereof is thereby acknowledged, he the said Thomas Clayton did grant, release and convey the several freehold estates and hereditaments, situate in the county of Lancaster, therein particularly described, with the appurtenances, unto the said Lord Grey, Baron Grey de Wilton, Charles Townley, Rundall Andrews, and Thomas Whitehead, and their heirs, to the use of the said plaintiff and his heirs, till the said marriage, and afterwards to the use of the said plaintiff and his assigns for life, without impeachment of waste; with remainder to the use of the said Lord Grey, Baron Grey de Wilton, Charles Townley, Rundall Andrews and Thomas Whitehead, and their heirs, during the life of the said plaintiff, *upon trust, to preserve contingent remainders, with remainder to the said Susan Nuttall and her assigns, to receive a certain rent-charge thereout for her jointure and in bar of dower, with remainder to the use of the first and other sons of the said plaintiff on the body of the said Susan Nuttall to be begotten, and the heirs male of their bodies severally and successively in tail male, with remainder to the use of the first son of the said plaintiff on the body of any woman or women he might happen to marry after the decease of the said Susan Nuttall, to be begotten, and the heirs male of the body of such first son lawfully issuing, with remainder to the use of the second, third, fourth, and all and every other son and sons of the said plaintiff, on the body of any such woman or women as he might happen to marry after the decease of the said Susan Nuttall, to be begotten, and the heirs male of his and their body and bodies issuing, with remainder to the use of all and every

[*304, n.]

the daughter and daughters of the said plaintiff, on the body of the said Susan Nuttall to be begotten, equally to be divided between such daughters (if more than one) share and share alike, as tenants in common, and of the heirs of the body and bodies of such daughter and daughters lawfully issuing, and failing issue of any of the said daughters, then as to the share or shares of such daughter or daughters whose issue should fail, to the use of all and every other such daughter or daughters in like manner, and of the heirs of the body and bodies of such other daughter or daughters lawfully issuing; and in case all such daughters, save one, should die without issue, or if there should be but one such daughter, then to the use of such one surviving or only daughter, and the heirs of her body, with remainder to the use of the said plaintiff and his heirs for ever.

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TON.

“That the marriage between the said plaintiff and Susan Nuttall soon afterwards took effect, and the said Susan Nuttall is since dead without issue, and after her decease, and before the plaintiff married a second wife, he, by Indentures of lease and release, dated the 17th and 18th days of June, 1794, duly executed and made between the said plaintiff of the one part, and Lady Mary Stanley of the other *part, for a full and valuable consideration by her to him in hand paid, granted and released, and conveyed certain parts of the freehold estates and hereditaments comprised in and settled by the before-mentioned Indentures and marriage settlement, with the appur enances, unto and to the use of the said Lady Mary Stanley, her heirs and assigns, for ever absolutely.”

[*305, n.]

“Lady Mary Stanley insists that the limitation to the children of the second marriage of the plaintiff, is without any valuable consideration, and therefore void against her as a purchaser.”

“The question for the opinion of the Court, is:—

“Whether such conveyance by the plaintiff to Lady Mary Stanley, is a good and valid conveyance to a purchaser for a valuable consideration against the issue of the plaintiff’s second marriage?”

To this question, the Judges returned the following certificate:

“This case has been argued before us by counsel, we have

CLAYTON considered it, and are of opinion, that the conveyance by the
 v.
 EARL WIN. plaintiff to Lady Mary Stanley, is not a good and valid con-
 TON. veyance against the issue of the plaintiff's second marriage.

" ELLENBOROUGH,
 " R. GROSE,
 " S. LE BLANC,
 " J. BATLEY."

1818.

Oct. 30.

ATTORNEY-GENERAL v. MAYOR OF BRISTOL.

(3 Maddock, 319—352.)

LEACH, V.-C.

A REPORT of this case on appeal will be given in a later volume of the Revised Reports, from 2 Jacob & Walker, 294, where this decision was reversed by Lord ELDON, L. C. : and see next case.

1818.

ATTORNEY-GENERAL v. MAYOR OF COVENTRY.†

(3 Maddock, 353—370.)

[358i]

(THE following argument of Lord Chief Justice HOLT, in this great leading case, on the subject of charities, having never before been printed, will probably be acceptable to the profession.‡)

HOLT, Ch. J. :

I will put it shortly, by way of case. Monastery lands were purchased in the 34th Henry VIII. by the City of Coventry, with money they had of Sir Thomas White, they being in value, at that time, about 70*l.* per annum ; 1,400*l.* was the purchase money ; 1,000*l.* of which was effectually paid by Sir Thomas White, as a gift to the city ; and eight years afterwards, there was 400*l.* more paid by him upon accounts made up between him and the city, and afterwards there was made

† See the note on the preceding case, on the appeal from which Lord ELDON refers at length to this report of the *Attorney-General v. Mayor of Coventry*.—O. A. S.

‡ No information is given by Maddock as to the source of this report. It has, however, all the internal marks of being genuine.—F. P.

this indenture, dated 6th July, 5th Edward VI. between the city of Coventry and the Merchant Taylors, which recites that the city of Coventry had bought, to them and their successors, of King Henry VIII. divers lands, of the value of, &c. as by letters patent, &c.; which purchase was made by the aid, &c. minding thereby to relieve and preserve the commonwealth of the city of Coventry, then in great ruin and decay; and that Sir Thomas White, of his goodness, &c. had given and paid 1,400*l.*; in consideration *whereof, the mayor, bailiffs and commonalty, &c. agree, after the decease of Sir Thomas White, to give, &c. and employ, &c. the particulars whereof it is not necessary to repeat; the profits of which lands are increased to a much greater value than 70*l.* a year, being now 600*l.* or 700*l.* a year; now the question is, whether upon this deed, or any other evidence produced that is not contained in this deed, the increase of the rents, and the improvement of the lands so purchased, upon which these articles are made for payment of 70*l.* a year, which, whether it shall enure to the advantage of the charity, or to the advantage of the city of Coventry. Now I do concur with my brothers, that they shall not enure to the increase of the charity, but wholly to the advantage of the city of Coventry. I shall in the first place consider the deed of articles that are made between the Merchant Taylors and the city of Coventry, 5th Edward VI. whether such a construction for the increase of this charity can be made from those articles alone? In the next place, I shall consider the particulars that have been given in evidence,—whether they are sufficient to make out in a court of equity, upon the increase of the value of the lands, that the charity should so too? And first, I am of opinion, that there is no construction can be made upon these articles that are entered into by the city of Coventry to the Merchant Taylors, that there should be an increase of the charity, or an augmentation of the respective payments upon the improvement of these rents; for, first, it is recited in these very articles, that the city of Coventry were the purchasers of these lands, though my brother *Powell* says, he takes Sir Thomas White to be the purchaser, and not the city; but under favour, this is an averment against the articles themselves, which created *the charity. Now, consider at what time of day this word

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“ purchaser ” was used, and it's not only said purchased, but bought for them; it was in the time of Edward VI. In 34th Henry VIII. was the purchase. Now, when a man does purchase and buy lands, he does, in construction of law and equity, buy them to his own use. It was so before and long since the statute. If one buys land of another, he to whom it was sold had it to his own use, for there need no use to be declared upon the buying of it. If a man makes a bargain and sale, upon consideration of money paid, and bargain and sell to A. and his heirs, the use is to A. and his heirs, without any express declaration. Now, I do believe, at the time of the purchase, and also at the time of the making of the articles, a trust different from a use was not thought of, I can't find then any such notion then introduced, for if you consider the 27th Henry VIII. was seven years before the purchase, and the design of that statute was to execute uses and trusts into actual possession, and was intended to destroy all uses and trusts whatsoever, and so it was said and allowed in *Chadwick's* case, but since, uses have been executed in possession, the invention of trusts came in afterwards; and I believe, at the time of the purchase, or at the time of these articles, you will not find any trust different from a use. Now, when it is said that this estate was purchased by the city of Coventry, to them and their heirs, that they bought it and they purchased it; can it be said, that it was not to their use and advantage? And you can never enforce any trust at that time, for, as I take it, there was no such thing at that time. Now I say, when it is mentioned and recited in the articles, that the city of Coventry did buy and purchase these lands to them and their successors, *it must be thereby understood, that it was to their sole use and benefit. Besides, it was never thought of till afterwards, that a corporation aggregate could stand seised to a use; a sole might, but an aggregate body could not. Why? Because no subpoena did lie against them, but since trusts have been introduced, that notion has fallen to the ground. But I am now speaking of a deed, which ought to be construed according to the opinion of those times, when there was no trust different from a use. Therefore, when it is said the city of Coventry were the buyers and purchasers of

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these lands, it imports that they had them to the use of them and their successors, and to their benefit. But then, suppose you should expound this deed with such a latitude as is allowed at this day, and that the deed was now made, and that the money was Sir Thomas White's, it is not said that he laid out the money in the purchase, but that he gave the money to the city of Coventry; so then, if he gives it to them, it is theirs. And if I give a man 1,000*l.* to buy lands, 'tis his money, and if he lays it out and buys land, can any say there is any trust? It is contrary to the nature of the thing. They have bought and purchased these lands; Sir Thomas White gives them 1,400*l.* to make the purchase; though the money was Sir Thomas White's originally, yet it was theirs at the time of the purchase. In the third place, when this purchase was made, it does appear that the purchase was not made for the sake of this charity, but for some other use, that is, to the corporation; what use it was for, or what agreement was made between Sir Thomas White and the corporation does not appear. But one thing is plainly expressed: it was for the relief of the city, which was gone to ruin and decay; and it was a charity and kindness that Sir *Thomas White did at that time, to repair the broken estate of the city, and to advantage their wealth and prosperity; therefore Sir Thomas White having given them 1,400*l.* to make this purchase, to repair the broken and decayed estate of the city,—what then? In consideration therefore, that he had been so kind, they erect this charity, and covenant with the Merchant Taylors Company to pay those several charges, which amount to 70*l.* a year, and it appears to be done at the instance, and by the importunity of Sir Thomas White and his friends. In the fourth place, the articles themselves do import the city of Coventry to be the absolute owners of the estate, discharged from any trust; for otherwise, if they were not the owners, but trustees for Sir Thomas White and his heirs, it had been necessary for Sir Thomas White to have joined in the raising of this charity, and in charging this estate with 70*l.* a year, if it was to be done. Now, if any one as a trustee was seised of lands in fee, in trust for another and his heirs, and a charity was to be settled charged on such lands, nobody now would

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venture to do it, unless *cestui que trust* joined in the settling of that charity, and the declaring of it; so that if Sir Thomas White had any control over this estate, and the city of Coventry were not the absolute owners, then surely, it would have been advised that Sir Thomas White should have joined in declaring the payment of this 70*l.* a year which was given to the charity; and when he is not joined, though it appears he desired the thing, and they are the persons only that say 70*l.* a year shall be paid to such charity, that shews them to be the absolute owners of the estate in equity, as well as in law; otherwise, there would be a defect of power in the article. Fifthly, admitting Sir Thomas White had joined, and they were in this case chargeable as *trustees, it is impossible, by construction from the deed, to enlarge the sum above 70*l.* a year; first, because the land itself is not given, only such sums of money amounting to 70*l.* a year and no more; and that is given out of the profits of the lands; and there is a manifest difference between the charging of the lands with the charity, and the charging of the land with the payment of a certain sum of money to be disposed of in a charity; for where the land itself is disposed to the charity, let the value be what it will, be it more or be it less, the charity shall have all the profits issuing out of the lands, and since they are to have the profitable land of what value it will, they run the hazard, be it more or be it less. But where the land is not given to charity, but a sum issuing out of the land, and the land itself is no further charged than with such a sum, if the profits of the lands increase, yet the sum bestowed on the charity shall not. There has been mentioned the case of *Thetford School*,† and my brother *Powell* endeavoured to make a difference between that and this. I confess I know there is a difference, and a great one, upon the distinction I have made. I will put the case at large:—A man seised of lands of the value of 35*l.* per year, and no more, conveys this land to divers trustees, for the benefit of a free school, so much to the minister, and so much to the schoolmaster and usher, and so much to four poor people, which in the whole did amount to the value of the land as that time it was. Why in process of time these lands so disposed of were increased to the value of 100*l.* a

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† 8 Co. Rep. 130.

year, and the question was, whether or no the charity should be increased, and it was held it should, and what was the reason of it? Why, the reason was, because the lands were disposed of to the charity, and no sum *certain out of the land, but the land itself was given, and there is no limitation of any particular sum, and his saying afterwards so much shall be paid to the minister, and so much shall be paid to the schoolmaster, that does not go by way of restriction, but only by way of direction in what proportion the profits of the lands shall be applied to the payment of these people. If a man dispose of lands, the value of 100*l.* a year, to charity, and afterwards say that 50*l.* a year shall be distributed in such a manner, no doubt the whole profits of the lands shall go to the charity; for the *videlicet*, though under the profits of the lands, shall not diminish the charity, for if a man should grant lands to such a use, *videlicet*, 20*l.* a year, out of the lands, that is repugnant, and contradicts the grant before. Now is here no more than a gross sum of 70*l.* a year given by this deed for the maintenance of this charity, and to be distributed in such manner as is mentioned in the deed. Suppose Sir Thomas White was out of the case, and we should consider this as a legal charity; suppose the mayor, bailiffs, and commonalty of Coventry, had granted a rent of 70*l.* a year to the Merchant Taylors Company, to this charity, to be disposed in such manner, —surely nobody would say that they could pretend to have a farthing more than 70*l.* a year, the lands were improved, and no more is here,—it is so in law, and I take it that equity shall never extend a man's grant beyond the natural import of it. I would know by what rule, justice or reason, you can make this a greater sum than what he gives. A man charges his land with 70*l.* a year, and you will make such a construction as to charge it with 500*l.* or 600*l.* a year. Now I think if it was by way of the grant of a rent, there could be no colour of it. *Now see if there will be any alteration of the case by the manner of this charge. 'Tis not by the grant of a rent, but it is by articles of agreement. It appears by 48rd of this Queen, that directs the issuing forth of commissions, to require of lands given to charitable uses, that the Parliament did think there

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then wanted a sufficient remedy to compel the execution of trusts, for at that time trusts were rather left to the consciences of men, than under the power and jurisdiction of the Prince. But, however, since that, equity can relieve. That statute directs particular methods; but now, suits are commenced originally here. The legal security, in this case, are the articles of agreement, which did not at first affect the land. And if there had been a distribution of this money, as mentioned in the articles, which would have been a full performance of the articles, could not that have discharged them in law? Certainly, it would have discharged them in law; but it is come to pass, that though these articles are not a legal, yet they are an equitable charge; but you will construe this equitable charge in the same manner as if it was a legal, you will not in equity make it more than if it were a rent-charge at law, that would be a hard thing for you that imitate the law; if you imitate it in part, you ought to do it in the whole. Besides, this construction has been made upon the Statute of Superstitious Uses, as it does appear in *Adams and Lambert's* case, Co. Rep. fol. 110. There, this difference is taken; lands of the value of 20*l.* a year are conveyed to trustees, and that is for the payment of 10*l.* a year appointed to be paid to a priest for praying for his soul, and there is no other limitation there. There the question was, whether all the lands should go to the Crown. It was held all should. Why? Because, by express words before the whole

[*361] *land is given to the superstitious use, and he coming afterwards, and saying that 10*l.* a year should be paid to the priest, that does not restrain the extent of the former gift; but then suppose the land had been given to another, to the intent to pay 10*l.* out of it, and he gives that 10*l.* a year to a priest, and the land is of the value of 20*l.* a year; there, no more than 10*l.* a year shall go to the Crown by the Statute of Superstitious Uses, because the land is given to another with an intent to pay 10*l.* a year to a superstitious use. But where the land itself is given, though but 10*l.* a year directed to be paid, the whole land shall go to the Crown, so that there is a great difference between charging the land with a certain sum, and giving the land itself to such purpose. If a man does give the land itself to such uses,

though the certain sum directed to be paid is not near the value of the land, yet if the land improve, the whole land shall go; but in case a man have land of 40*l.* a year, and he does grant a rent-charge of 40*l.* a year to charitable uses, and this land afterwards increases to 100*l.* a year, the grantee shall have no more than 40*l.* a year, and there is a clear reason for it, which is this; though 40*l.* a year is about the value of the land at that time, yet when he does not think fit to dispose of the land, but charge it with 40*l.* a year, it should be presumed that he had a prospect that the land would improve (especially if it does accordingly do so); and he designed to have the benefit of that improvement for otherwise he would have given the land itself. Now, in the case of *Thetford School* the land is given. And so in the case of *Sutton Colfield*. A man seised of land of 3*l.* a year, does convey it for the maintenance of a schoolmaster, and there are express *words that the schoolmaster shall have 3*l.* a year, and the lands afterwards increase to 10*l.* a year, and it was held that the schoolmaster should have 10*l.* a year, notwithstanding those words, that there should only be paid to the schoolmaster 3*l.* a year, for that is more than to say, the value being no more at that time; but he had himself disposed of the land. But in this case the lands are not, but only a charge laid upon them. It may be objected there is a case in a book that has divers cases of charitable uses (711 *Gering* and *Hasting's* cases). A man seised of lands, let at that time at 10*l.* per annum, and devises the rent for maintenance of the poor; the heir at law does pay the 10*l.* a year, and demises the land for 40*l.* a year; the question was, whether the charity should be increased to 40*l.* a year. And it was held it should; but what is the reason? Because by the devise of the rents the lands themselves did pass; and it was so adjudged before that time, in a case that did not concern charity, *Kerry v. Derrick*, 2 Cro. 104; and it is not said, only the present rent, but all the rent; and for that reason it was held so in that case, because the devise did convey and pass the lands, and therefore the charity should be increased. But where the land is not given there is no case; nor does there appear any reason to me why the charity should increase; so that that was the first matter I proposed to consider, that is,

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the construction of this deed—whether any can be made, as it is presumed the charity should be increased. I shall now come, in the next place, to consider the particular evidence that hath been given to induce this Court to believe, that it was always intended and designed that this land *should be wholly at the disposal of Sir Thomas White; and that he was *cestui que trust*; and so, in consequence, he having a design for bestowing the whole value of the land to this charity, whether it can be construed by this deed that Sir Thomas White was *cestui que trust* of these lands; and whether, by any thing that appears, the land should enure to any other trust, or any other charity, or the increase of this charity above 70*l.* a year. And I hold, that when the deed is produced, whereby this charity is created, no evidence whatsoever contrary to the deed ought to be admitted; for where there is a deed, you ought to be confined solely to that deed; and it ought to be expounded by itself, or something of an equal nature, and no evidence without the deed ought to be admitted; for if so, it will contain the greatest confusion that can be in human affairs; for when a deed is made by advice of counsel, to admit of any reference without the deed is to give room for any sort of interrogation—would be the most dangerous thing to all men's title that can be. Now this deed does not import any trust for Sir Thomas White, nor any intent in the city of Coventry that this charity should be increased; and there is no evidence of any transaction, or passage that happened before or after the deed, that ought to be admitted, for the deed is the very title that creates the charity:—the charity derives its very being from the deed; and to construe itself otherwise than may be collected from the deed itself is to destroy the very deed upon which the charity rises. And I think what I say on this matter is well grounded upon *Beresford's* case, 7th Rep. 42. There, a father covenants to stand seised to the use of his son: though there might be a real ground of that *deed from natural affection, yet a sum of money being mentioned as the consideration, it shall not be intended to pass upon any other account than what is mentioned in the deed; for not saying, for divers other considerations, he was confined to the consideration mentioned in the deed, and says

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in that case you shall not give any other evidence to make it appear that the father made this deed out of natural affection. This I think, in point of law, is pretty certain; how far it will obtain in equity I cannot tell; but I think it reasonable in equity too. But if you will admit of other evidence to prove that it was Sir Thomas White's intention, or the city of Coventry's intention, that this charity should be enlarged as the rent and value of the lands increased, I shall take those things that seem most material into consideration, and they seem to be these five—1st, they say it appears by the articles that the money was Sir Thomas White's; and that after the purchase made, the corporation did account to Sir Thomas White: 2nd, it hath been mentioned, and that hath given my brother *Powell* occasion to say, that he reckoned Sir Thomas White the purchaser, because it is mentioned in the books of the corporation that these lands were Sir Thomas White's lands; and their own entries are, that Sir Thomas White was the owner and proprietor of these lands: 3rd, that Sir Thomas White's letter to the city of Coventry is a plain manifestation that he had a disposing power over the lands; for he writes to give 46*l.* per annum to his wife after his death, which implies, 1st, that Sir Thomas White was to have it for his life; 2ndly, that he had a power to direct how it should be disposed of after his death: 3rdly, that Sir Thomas White insists in his letter that the city of Coventry *might well comply with his desire in granting 46*l.* a year to his wife after his death, because the lands were come into their hands, and were improved, and yet he had permitted them to receive the profits of those rents: 4thly, that these profits of Sir Thomas White's lands are not brought to the account of the town, and therefore it must be looked upon that they themselves had an apprehension of bringing those profits to account; that they would have had a discovery. As to the first, that it was Sir Thomas White's money, and therefore a trust, it is very strange, as I said at first, that when it is mentioned that they bought and purchased these lands, and Sir Thomas White gave the money, that they must, by construction of law, raise a trust to Sir Thomas White. I was saying before, that I believe they had no notion of a trust at that time different from a use. I am

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sure they had not, because Sir Thomas White gives money to the corporation. Will you expound any gift to be a trust for the benefit of the giver? Surely, make what construction you will of it, if it was at this day upon the Statute of Frauds and Perjuries, I do not think if this deed was made at this day this would be a trust by operation of law; that is, if it was expressed in consideration of money paid by B. which was given by A. to B. would this make a trust in operation of law? Now that which I always took to be the law, but must submit to better judgment, is, that if it be mentioned, in consideration of money paid by A. a conveyance is made to B. and his heirs, there it appearing the money was A.'s a trust will arise; but if it was mentioned that the money was paid by B. though it was given by A., I do not think you shall avcr it was A.'s money, and so the *trust to A.; that would be to destroy the deed itself; but if it appears by the writing it was A.'s money, paid by B., it will be in trust for A.; but if A. gives B. money, you must take it as a charitable gift and disposition to B.; the very purchase shews they were improvable lands, as has been said by my brothers; for would anybody give for the best land in England, when money was 10*l.* per-cent., twenty years purchase. A man may as well give forty years purchase at this day; it is not evident from the nature of the thing, that it was foreseen that the lands would be improved, and yet it is plain by this agreement that Sir Thomas White was contented with a charge upon them of 70*l.* a-year, even upon this very land; and the exception of improvement is made good since, for it is at least 500*l.* a-year. The second thing that is urged is, that it is mentioned in their books as Sir Thomas White's lands. Why? Sir Thomas White was the donor; he advanced the 1,000*l.* that was part of the purchase money; and it seems upon the accounts between them, he taking but half the interest, they were looked upon as Sir Thomas White's lands; their entry in their books show who was their benefactor; it was so far an act of gratitude; but this does not ascertain the ownership or interest to be in Sir Thomas White; but to distinguish these lands from other lands. It is as much as to say, these lands were purchased from the Crown by the assistance and the money given by Sir Thomas White; but

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that does not amount to a declaration of trust. Then as to the third thing, as to Sir Thomas White's letter to the city; sure no use can be made of that to the advantage of the charity, but rather the contrary. Consider the nature of it; it was a soliciting, or importuning letter *wrote by Sir Thomas White himself. Can that be evidence against the Corporation? Say they, he requires such and such things to be done, and therefore sure he must have a power of disposing of the estate, otherwise he would not have wrote such a letter. No such inference can be made, but the contrary; for when he writes to them, and requests and importunes them to make a settlement of 46*l.* a-year for increasing his wife's jointure after his death, he does allow them to be the owners. He admits that they had at that time such a power of disposing of the estate; and if he had a power in equity, he might have forced them to it. In the next place, he takes notice the lands were improved four times the value since they were bought; and that he had suffered them to take the profits for twenty or twenty-one years, is as great an evidence against Sir Thomas White as can be; for had he right to more than 70*l.* a-year why did he suffer them to take the profits of the improved lands for so long a time? But indeed they did not think themselves to be under the power of Sir Thomas White; and, as my brother *Powell* says, that it was but a small thing for them to do, considering the prospect of the improvement of these lands to make the 24*l.* a-year, settled before, 46*l.* a-year after his decease; and they were ungrateful people; they did not yet however; they insisted on their rights; and they would, notwithstanding the importunity of THE MASTER OF THE ROLLS, that was executor with his wife, they would not go from the original intention of the articles; therefore, I say the letter, so far from being evidence to make out a trust for Sir Thomas White, that it is the greatest evidence a thing of that nature is capable of to the contrary—that it was *not a trust. Then as to the fourth thing, that is, that the profits of these lands are not brought to account in the town books. I think it appears quite otherwise, for they are entered in the town books, and it appears how from time to time the revenue has been disposed of. It is true, they did, as most Corporations, let good bargains to one

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another, especially where they were certain popular men in the town, some of the aldermen, and some others of their friends ; but however, it appears that all things have been brought to account and entered in the town books, these as well as other lands that belonged to the Corporation ; so that I do think there is nothing appears, out of the deed, upon any evidence that hath been given, that will be sufficient in this case to give any ground for any such construction, that this charity ought to be improved. I have but two reasons more upon the whole matter. One is, that of my brother *Blencow's*, the length of time, which goes a great way ; for, as my brother says, since Sir Thomas White died it is one hundred and thirty years, and this Corporation has enjoyed this estate ever since. Now my brother *Powell* does not approve of this reason ; for, says he, there is no Statute of Limitations run against a charity ; no, it is true ; but I believe my brother *Blencow* did not mean it upon that account. I do agree there is no Statute of Limitation shall bar a charity but in a thing that is obscure and dark ; and there hath been an enjoyment for a long time :—I think an enjoyment for a long time without interruption is a great evidence of a right ; for quiet enjoyment for a long time does presume a rightful enjoyment ; and nothing has been done to impeach it till within these seven years. I do agree, that if the deed had declared in express *terms that these very lands had been given to this charitable use, although there had been an enjoyment to the contrary to this deed, I should not have mattered it, but have determined it according to the express words of the deed ; because the deed would have showed what was disposed of to charity, that is the land itself ; and then all the profits disposed of contrary to the words of the deed ought to be accounted for, but the deed is otherwise ; that does only charge the land with 70*l.* a-year ; so that I do think length of time in a matter that is dark, to be very considerable, especially when what agreement, what terms Sir Thomas White and the city of Coventry might be upon at the time of the purchase, does not appear, and when there hath been a long enjoyment, and it does not appear that the right is to the contrary. I think all law and equity ought to determine with the enjoyment. The next thing is the account given in 1618.

The Merchant Taylors were the visitors, and they sent down to the city of Coventry to have a visitation, and it seems then the Judges were in their circuits, and all things were agreed to be well, though no more was disposed than 70*l.* a-year, and it was impossible for them to be ignorant of the increase of the value of the lands both from the nature of the thing and from the common observation, and a certificate was made that the charity was duly performed in such manner as the deed directs, and all was well, and all was at rest till within these seven years; therefore, truly, upon the whole matter, I look upon it that by the deed it is manifest and plain that nothing was intended for this charity but 70*l.* a-year, the land not being charged with more; and that nothing being given to the charity, *I think nothing ought to be given in evidence to control or construe the deed but what arises from the deed; but if other evidence was to be admitted, I think there is no other evidence in this case. And therefore, to conclude, my opinion is, that the charity ought not to be increased, by reason these lands are improved, to above 70*l.* a-year."

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BOWES *v.* THE EAST LONDON WATERWORKS.

(3 Maddock, 375—384.)

1818.
Nov. 10.

AFFIRMED on appeal in 1821, by Lord ELDON, L. C. A report of this case (Jacob, 324) will be given in a later volume of the Revised Reports. LEACH, V.-C.

FOSTER *v.* DEACON.†

(3 Maddock, 394—396.)

1818.
Nov. 13.

The completion of a contract being delayed for three years by difficulties in the title, the vendor held accountable for a deterioration of the land during that period. LEACH, V.-C. [394]

By an agreement, 16th of October, 1815, the defendant agreed to sell to the plaintiff certain lands, and that the purchaser

† *Clarke v. Ramuz*, '91, 2 Q. B. 456, 60 L. J. Q. B. 679.

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should take the rents and profits from Michaelmas then last, and that interest at five per cent. on the purchase money should be paid from that time until the purchase should be completed. The lands were then and still were in the possession of the defendant. A decree was obtained for a specific performance of the agreement, and the usual reference made as to title.

A motion was now made on behalf of the purchaser, that it might be referred to the Master, to whom the cause stood referred, to inquire and state to the Court what abatement ought to be made out of the purchase money, for or in respect of the deterioration in value of the premises since the purchase, and that the Master might be at liberty to state in his report any special circumstances that he might think proper.

In support of the motion, affidavits were filed to show the deterioration of the premises. Other affidavits were made in answer.

There were two other motions by different purchasers, to the same effect.

Mr. Barber, in support of the motion.

Mr. Heald, for the trustees.

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Mr. Wetherell, and *Mr. Roupell*, for the vendor.

THE VICE-CHANCELLOR :

If a purchaser is kept out of possession for three years, by difficulties in the title, and the land during that time remains uncultivated and otherwise deteriorated, it is obvious the purchaser cannot have what he agreed to purchase, but land diminished in value. If there had been wilful waste by the vendor, I should have had no hesitation in making him answer for the same out of the purchase money, but there is no wilful waste in this case; it is waste occasioned by negligence; and being so, when this motion came on before, I thought it necessary it should stand over, to ascertain, to whom the delay in completing the purchase was attributable. The affidavits do not make out that the purchaser could at any time with propriety

have accepted the possession. An offer of interim possession was, indeed, made by the vendor, but the vendee was not bound to accept it, nor could he prudently accept it, whilst the title was questionable.

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Part of the deterioration seems attributable to the conduct of a tenant whose lease has expired, but the vendor is answerable for his tenant.

I do not sift the affidavits as to the deterioration of the land. It is enough to say, they are sufficiently strong to justify a reference to the Master. Let it be referred to the Master to inquire whether the lands or hedges and fences of the estate have suffered any, and what, deterioration, and to what amount, by unhusbandlike conduct and mismanagement of the lands, since *the date of the purchase; and reserve the consideration of costs until the Master shall have made his report.

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FRENCH v. DAVIDSON.

(3 Maddock, 396—403.)

1818.
Nov. 14.

A direction by a testator, that his executors shall pay an annuity, unless circumstances render it unnecessary, inexpedient and impracticable, means unless in the opinion of his executors circumstances shall so render it. The judgment of the executors in this respect is not controllable by a court of equity, unless they act *malâ fide*.

LEACH, V.-C.
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RICHARD SHAW, by a fourth codicil, dated 17th May, 1816, to his will, dated 28th December, 1811, amongst other bequests, bequeathed as follows:—"In consequence of the late failure of Mr. French, (Nathaniel Bogle French, the father of the plaintiff) I have promised his daughter-in-law,† the wife of Nathaniel Bogle French, Jun., Esq., the produce of whose estates were consigned to Mr. French's house until his bankruptcy, and is now consigned to Messrs. John Deffell and Son, to hold at her disposal, so long as such consignments shall continue with John Deffell and Son, 600*l.* a year for the support of himself and unmarried children; Mrs. French contributing a

† Elizabeth French (a defendant).

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like sum for the same purposes, subject however to be varied according to circumstances, both in respect to the amount, and in respect to the distribution; and we have already, that is to say, on the 6th July, paid the first quarter, amounting *to 300*l.*, intending to divide the like sum on the 6th day of October next, and every three months afterwards, until circumstances shall render it unnecessary, inexpedient or impracticable. Now, therefore, I do by this codicil to my will revoke the bequest to my son of 20,000*l.* three per cents. Consolidated Bank Annuities, and in lieu thereof, give to him all my shares and interests in all joint concerns or limited co-partnerships which I have with Mr. Deffell & Co., or the old firm of John Deffell and Son, trusting that my said son will so conduct himself as to induce his uncle to admit him to the same share in a general co-partnership, provided it does not interfere with any plan for the establishment of his own sons, and provided my eldest son shall make choice of that line of business; and I also revoke the bequest of Springfield Cottage to my wife; and it is my wish, that so long as the produce of the estates of the late Chief Justice of Jamaica, William Jackson, Esq. and by him devised to trustees for the use of his daughter and her children, shall be consigned to the house of John Deffell and Son, in which I hold a moiety of the emoluments arising from those and other consignments, and the business appertaining thereto, unless circumstances should render it unnecessary, inexpedient and impracticable, my executors shall pay out of the income arising from the residue of my general property, 600*l.* a year, by quarterly payments, to Mrs. Bogle French, for the use of the before-named Nathaniel Bogle French, and all or any of the unmarried children, and in such shares as she shall think proper; and I declare, that this codicil, written in haste, all in my own hand, is meant to stand in the place of the three codicils which I have already made, until I can prepare one in a better form, or new model my will, which I can do with more *propriety some time hence, if my life should be spared, than at present, on account of my property being outstanding, not capable of being so accurately estimated as I could wish; and in all other respects I confirm my said will."

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The testator died on the 11th August, 1816, leaving assets

sufficient to answer the plaintiff's claim ; and the defendants, Davidson, Deffell and Shaw, proved his will.

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Nathaniel Bogle French, the plaintiff's late father, died on the 9th December, 1817, without having obtained his certificate under his bankruptcy, leaving the plaintiff, his only unmarried daughter, in distressed circumstances and without any property, and three unmarried sons, one of them an infant.

At the death of the testator, N. B. French had another daughter who was unmarried, but who afterwards married the defendant William Law, a short time before the death of her father, Nathaniel Bogle French.

The testator in his life-time, and Elizabeth French, paid the sum of 300*l.* to the plaintiff's father, on the 6th July, 1817, being the first quarterly payment of the annuity. The prayer of the bill, was, that the trusts of the fourth codicil as to the annuity of 600*l.* might be established, and that the plaintiff, as the only unmarried daughter of the said Nathaniel Bogle French deceased, might be declared entitled to the whole of the annuity of 600*l.* for her own use and benefit, during so long as she should remain unmarried ; and that, if necessary, the defendant Elizabeth French might be decreed to appoint the whole of such annuity to the *plaintiff ; and that an account might be taken of what was due to the plaintiff ; and that the defendants the executors might be decreed to pay the same to the plaintiff, out of the testator's personal estate and effects not specifically bequeathed ; and that a sufficient part of the testator's estate and effects might be set apart for the purpose of securing the due and punctual payment of the said annuity of 600*l.* to the plaintiff, or for her benefit.

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The defendants, Davidson, Deffell and Shaw, by their answers, admitted assets, according to their present state, sufficient to pay the annuity. They further stated, that the defendants Augustine Bogle French and James Bogle French, [two of the children of the late N. B. French] are now placed in situations wholly different from that which the testator contemplated at the time of making his fourth codicil, and that in consequence, Elizabeth French, before and since the death of the testator, gave notice of her intention to discontinue, and she has in fact discontinued the payment of the annuity of 600*l.* ; and they, by

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their answer, insisted that the bequest of the annuity by the testator, was either altogether void from the uncertainty of the expressions used by the testator, or that in consequence of the discontinuance of payment by Elizabeth French, and of the events which have occurred, and particularly of the death of Nathaniel Bogle French, and the alterations in his family, the annuity is no longer payable; and that the payment of the same has become both unnecessary and inexpedient, and that the same ought not now to be paid by the defendants, or at least, that a proportion only of the sum is now payable; and that in all events, the same or any part thereof is only payable as long as the produce of the estates of William Jackson, Esq. continues to be consigned to the *house of John Deffell and Son, which consignments the said Elizabeth French is at liberty to direct to any other house whenever she pleases.

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Elizabeth Bogle French, by her answer, insisted that the payment of her proportion of the annuity of 600*l.* was on her part merely voluntary, and that her proportion was determinable at any time, at her pleasure; and that in consequence of the conduct of some part of the late Nathaniel Bogle French's family, and of alterations in the same, she, during the life of Nathaniel Bogle French, gave notice of her intention to discontinue the annuity, and had since actually discontinued her proportion of the joint annuity or allowance; that since the bankruptcy of Nathaniel Bogle French, the consignments of the estate of the defendant's late father have been made to J. Deffell & Co., but that she has a right to cause the consignments of the estate to be made to any other mercantile house.

James Bogle French, (one of the sons of Nathaniel Bogle French deceased) by his answer, claimed to be entitled to one fourth part or share of the annuity of 600*l.* bequeathed by the testator Richard Shaw.

Augustine Bogle French (another son of Nathaniel Bogle French deceased,) by his answer, claimed another fourth part of the annuity bequeathed by the testator.

The infant, Augustine Bogle French, (another son of Nathaniel Bogle French deceased,) submitted his interest to the protection of the Court.

William Law, and Letitia Bogle Law, his wife, by their answer, claimed to be entitled in her right to one *fifth part of the annuity given by the testator Richard Shaw.

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Sir A. Pigott, and Mr. Raithby, for the plaintiff :

The first part of the codicil is mere recital, and then follows the legatory disposition. The annuity is given so long as the consignments of the estates were made to Deffell & Co. ; French the father, and his unmarried children, took a joint interest ; after his death it survived to his daughters. So long as French the father lived, he was permitted to receive the whole annuity ; after his death, one of his daughters, the defendant Mrs. Law, married ; she is therefore no longer an unmarried child, or entitled to claim any thing except what she might be entitled to upon the death of her father, and her marriage. The plaintiff has continued unmarried, and is, as we contend, the only person entitled to claim the annuity, as her brothers could never have been meant to take. Two of them had attained twenty-one, and must be supposed capable of providing for themselves ; but supposing they are included in the words of the gift, Mrs. French may appoint the plaintiff to take the whole, and the Court will probably direct her to do so, the two sons being provided for. Mrs. French was not bound to continue her bounty, but it cannot be said that the continuance of her bounty was the condition on which Shaw's legacy was to depend. If her's was withdrawn, there was more occasion for Shaw's. It was not left to the absolute discretion of the executors whether they should continue the annuity ; their discretion was limited, not arbitrary. They were to continue it, unless it was " unnecessary, inexpedient and impracticable : " it is " necessary and expedient," because the plaintiff has no other means of support ; it is not " impracticable," because the executors admit *assets. The executors assign no reason for withdrawing this annuity. The Court will not say they have an absolute discretionary authority, unless compelled by the words of the will, as such an authority would be subject to great abuse.

[*402]

Mr. Bell, for the executors, and the counsel for the other parties, were stopped by

FRENCH
v.
DAVIDSON. THE VICE-CHANCELLOR :

This codicil is an authority to his executors to pay to Mrs. Bogle French, for the purposes stated, 600*l.* a year out of his residuary property, so long as the produce of Mr. Jackson's estate should be consigned to the house of John Deffell & Son. The recital explains, that he was partly induced to give this authority by Mrs. French's promise to contribute the same sum, but he has not made the authority dependent upon her performance of that promise. The executors are to exercise the authority, unless circumstances shall render it "unnecessary, inexpedient and impracticable;" by which must be meant, "shall in their opinion render it unnecessary, inexpedient and impracticable." If they had distinctly stated in their answer, that they had not made the payment, because, using their best discretion upon the subject, they had come to a conclusion that circumstances had rendered the payment unnecessary, inexpedient and impracticable, a court of equity could not have controlled their judgment, unless it appeared that they had acted *malâ fide*. But their answer states many mixed motives for their refusal to pay this annuity; and it is plain, that they have never simply addressed themselves to the sound exercise of that discretion which the testator has been pleased to place in them.

[403] It is a reasonable conjecture, that the testator meant, that only French and his unmarried daughters should take this annuity; but he has used the general expression, of "unmarried children."

If, however, this annuity be continued, Mrs. Bogle French may appoint the whole of the annuity to be paid to the plaintiff, but I have no authority to direct her to do so.

Declare, in the words of the will, that the annuity is to be paid so long as the consignments are continued, unless, in the judgment of the executors, circumstances shall render it unnecessary, inexpedient and impracticable. The costs must be paid out of the testator's estate.

TIDWELL v. ARIEL AND OTHERS.†

(3 Maddock, 403—409.)

1818.
Nov. 19.

A legacy to A. as one of a class of 600*l.* to be paid at the end of one year after the testator's death, or to their several and respective heirs, held to have lapsed by the death of A. in the life-time of the testator. LEACH, V.-C.
[403]

* * DAVID KIRKBY, by his will, 14th October, 1812, among other things, gave and bequeathed [his personal property to trustees in trust to pay a number of pecuniary legacies to various legatees including a legacy of 600*l.* to his daughter Dorothy Tidwell], all which said several and respective legacies the said testator willed, “that they should be paid by his said trustees, at the end of one whole year next after his decease, or to their several and respective heirs.” [And the testator bequeathed the balance of his property in his trustees hands unto his said sons and daughters, share and share alike, and to be paid unto them severally and respectively by the said trustees, and the survivor of them, or their heirs, at the end of one whole year next after his decease, or their several and respective heirs.]

The testator died in 1814, leaving several children, but the testator's daughter Dorothy Tidwell died very shortly before the testator, leaving the plaintiff Samuel Tidwell her only child and heir-at-law, and leaving her husband the plaintiff John Lawrence Tidwell her administrator.

The plaintiff Samuel Tidwell] *insisted, that upon the testator's decease, although the said Dorothy Tidwell, his mother, was not then living, yet that under the circumstances aforesaid, of the testator's express declaration of his intent in that behalf, and also by the true construction of his will, the legacy of 600*l.*, and also of the share of the residue therein mentioned to be given to her, took effect nevertheless, and vested in him under the description of her heir; or in case the Court should be of opinion that the testator meant by the word “heir,” with reference to the nature of the property bequeathed, rather to describe or denote the personal representatives of his said legatees, in that case the plaintiff John Lawrence Tidwell submitted, and insisted, that the legacy and share of residue, mentioned to be given to the said Dorothy, his late wife, vested

[*406]

† *In re Porter's Trusts* (1857) 4 K. & J. 188, 27 L. J. Ch. 196, 198.

TIDWELL
v.
ARIEL. in him as her administrator and personal representative. The prayer of the bill was accordingly.

The executors, by their answer, admitted assets, and submitted to act as the Court should direct.

[407] Ann Kirkby, Richard Derry and Jane his wife, and Benjamin Rayson and Mary his wife, late Mary Fenton, and David Kirkby, by their answers, insisted that neither of the plaintiffs had any claim to the legacy.

When the cause was opened, the VICE-CHANCELLOR said that John Lawrence Tidwell, the father, was improperly joined with his son as plaintiff, they having conflicting interests, and that the cause must stand over, with liberty to amend the bill by making the father a defendant. But upon a letter of the father being produced, by which he agreed to give up, in favour of his son, any interest he might be entitled to under the will, the cause was permitted to proceed.

Mr. Wetherell, and Mr. G. Wilson, for the plaintiffs :

* * The testator here, contemplating the possible death of his children in his life-time, provides that the legacies shall be paid to the legatees at the end of one year after his decease, "or to their several and respective heirs." There is no authority expressly in point. * * *

[409] The meaning of the word "or" is clear ; it is used not only as to the legacy of 600*l.*, but in the gift of the residue. The Court will not make a man die intestate as to any part of his property, unless unavoidably bound to do so. Then what is the meaning of the word "heirs" ? Either the son takes as heir, or his father as legal representative ; but as the father has given up his interest in favour of his son, which shall take is not material.

Mr. Heald, and Mr. Pepys, contrà, were stopped by

THE VICE-CHANCELLOR :

The legacy of 600*l.* is in the first place given to Dorothy, *simpliciter*, as a mere personal legacy, failing by her death before the testator. The testator afterwards directs that his respective legacies shall be paid by his trustees at the end of one whole year

next after his decease, or to their several or respective heirs. It is said that this direction is inconsistent with a mere personal gift to Dorothy, and is therefore a substitution of a new legatee in the event of her dying before the testator. If the direction had been, that the respective legacies should at his death be paid to the legatees or their respective heirs, the inconsistency contended for would have existed: but a payment to the representative at the end of a year after the testator's death, if the legatee be not then living, is not inconsistent with a personal gift to the legatee. The same reasoning applies to the gift of the residue. The bill must be dismissed, but without costs. I wish I could give the plaintiff his costs: but the Court cannot do this when it dismisses the bill.

TIDWELL
v.
ARIEL.

BROWNE v. LORD KENYON.

(3 Maddock, 410—417.)

1818.
Nov. 17.

Bequest to A. for life, and afterwards to B. but if he should be then dead, to C. and D. in equal shares, or the whole to the survivor of them. B. died in the life of the tenant for life, as did also C. and D. Held, that the gift to C. and D. was a vested interest in them as tenants in common, subject to be divested if one only should survive the tenant for life.

LEACH, V.-C.

[410]

[C. WHITLEY, being entitled to 1,000*l.* charged upon certain lands, whereof her brother Ralph Whitley was seised in fee, subject to that charge, and entitled also to personal estate, by her will, 13th August, 1767, amongst other bequests, bequeathed the said sum of 1,000*l.* to trustees in trust to pay the interest thereof unto her cousin Abigail Jones, during her life; and after her death to pay the interest thereof to Miss Elizabeth Chetwode, and Mrs. Davison, of the Brand, daughters of the late Sir Philip Tronchett Chetwode, of Oakley, Bart. in equal shares during their joint lives; and after the death of either of them, then to the survivor of them for her life; and after the death of the survivor of them the said Elizabeth Chetwode and Mrs. Davison, to pay the principal sum of 1,000*l.* to her cousin, Sir John Chetwode, Bart.; but if he be then dead, then and in such case she directed that the said trustees should pay the said sum of

BROWN
v.
LORD
KENTON.

1,000*l.* to his two brothers in equal shares, or the whole to the survivor of them. And the said testatrix thereby gave and bequeathed unto her said cousin, Abigail Jones, all the rest, residue and remainder of her personal estate, of what nature or kind soever :—and appointed the said Abigail Jones executrix of her said will.

The testatrix died soon after the making of her will ; and the said Eliz. Chetwode, Abigail Jones, Mrs. Davison, Sir John Chetwode, and his two brothers, Charles Chetwode and Philip Chetwode, survived the testatrix :—Eliz. Chetwode died many years ago, and after her death Charles Chetwode died intestate, leaving a widow and one child, now the wife of the defendant Wm. Rose, and the widow of Charles Chetwode obtained letters of administration to him, and afterwards married Wm. Bertles (since deceased) : After the death of Charles Chetwode, Philip Chetwode died, and by his will appointed his wife Ann Chetwode universal legatee and sole executrix, and she proved his will, and afterwards died, and by her will appointed the plaintiff her residuary legatee and executor, and he proved her will : After the death of Philip Chetwode, the said Sir John Chetwode died : Mrs. Davison, after the date of Charlotte Whitley's will, married Edward Mainwaring, and the (interest on the) 1,000*l.* was paid to Mrs. Mainwaring during her life, and on the 13th February, 1816, she died :—Abigail Jones died on the 1st of June, 1776, and the defendant Mary Holland Boulger alleges she is the personal representative of Abigail Jones and of the said Charlotte Whitley : The Prayer of the bill was, that the plaintiff might be declared to be entitled to the said sum of 1,000*l.* and the interest thereon, since the death of Mrs. Mainwaring, and for consequential relief.]

[413]

Mr. Horne, and *Mr. Merivale*, for the plaintiff :

Both the brothers died in the life of the tenant for life ; and the question, is, whether the representatives of both, or of one brother, are entitled, or whether the legacy lapsed ?

[*414]

The bequest over to the two brothers gave them *vested interests, unless the words “or the whole to the survivor of them,” make a difference. If either died, the testator meant

there should be no division, but that the money should go to the survivor. [They cited *Scurfield v. Howes*,† and claimed the whole legacy of 1,000*l.*]

BROWNE
v.
LORD
KENYON.

Mr. Benyon, and *Mr. Richards*, for Mary Holland Boulger,
the representative of the residuary legatee : * * *

Mr. Hart, and *Mr. Rose*, for the defendants Browne [415]
and Ux. :

Mr. Bell, and *Mr. Blenman*, for the defendant Anne
Bertles :

If either of the brothers had died during the life of the testator the survivor would have taken ; but as both survived the testator, they both took vested interests. * * Where there is a vested interest to be divested on the happening of a contingency, it continues vested until the contingency happens. Here the contingency was the surviving of the tenant for life ; and as that contingency did not take place, but both brothers died before the death of the tenant for life, their vested interests were not divested.

THE VICE-CHANCELLOR :

What the intention of the testator was must be looked for in the words of his will : nothing more can be supposed to be intended than what he has expressed. The expression may be often at variance with *the real intention, and it may be so here, [*416] but a Court must decide on the expressed intention.

It has been argued, that this legacy was given over only on a contingency, and that in the events which have happened the money must be considered as undisposed of. It is now too late to argue that. The particle “then” is to be applied not to the vesting, but to the possession. The only question arises, in the bequest to the two brothers, on the words, “or the whole to the survivor.” To what period is the survivorship to be applied ? It is said to be meant, that if both died during the life of the tenant for life, and one only a day before the other, the survivor

† 3 Br. C. C. 90.

BROWNE
v.
LORD
KENTON.

was to take the whole, but it is difficult to believe that such could be the meaning of the testatrix, there being no motive for such a preference. Sir J. Chetwode is expressly to take only if he survives the last tenant for life; and if he dies before, then she gives the sum of 1,000*l.* to his two brothers, in equal shares, or the whole to the survivor of them. The obvious meaning is, that if one only survived the tenant for life, he should take the whole. It is in expression, therefore, a vested gift to the two as tenants in common, subject to be divested if one alone should survive the tenant for life, but which never was divested, because that event did not happen. The two brothers, therefore, took vested interests as tenants in common, and the money is now divisible between their representatives. It may be well doubted whether this was the real intention, and whether the testatrix did mean that either brother should take any interest without surviving the tenant for life, but the force of the expression is otherwise.

[*417]

*Declare that *the representatives of Charles and Philip Chetwode are entitled to the legacy, &c.*



1818.
Nov. 21.

WOOD v. ABREY.†

(3 Maddock, 417—424.)

LEACH, V.-C.
[417]

A tenant for life, with a remainder-man in tail, both in distress, join in selling the estate for an inadequate consideration. Held, that it could not be considered as the sale of a reversionary interest, and subject to the rules relating to sales of such interests; but that the sale was invalid, on account of the inadequacy of the consideration, coupled with the distress of the vendors, and their want of advice.

THOMAS WOOD was tenant for life of certain freehold and copyhold estates, with remainder to trustees to preserve, &c., with remainder to the first son of Wood in tail, with remainder to his second son; with remainders over.

In 1803, Thomas Wood granted a lease of the freehold and copyhold premises to one Oliver Whitehead for 21 years, if Wood should so long live, at the annual rent of 60*l.*; and Wood, being afterwards in want of money, granted two annuities of 40*l.*

† See *Dunnage v. White*, p. 33 Ch. D. 312, 58 L. J. Ch. 113.—above, and *Fry v. Lane* (1868) 40 F. P.

and 10*l.* payable during his own life, and secured on the before mentioned rent.

WOOD
v.
ABREY.

Wood, afterwards, owing to the annuities and the smallness of the rent, was so much reduced, that he obtained his livelihood as a common porter.

Oliver Whitehead assigned his lease to one Mason, who became bankrupt, and the lease was put up to sale by public auction by his assignees, and the defendant became the purchaser.

Some years prior, Thomas Wood the younger (the eldest son of Thomas Wood the tenant for life, and first tenant in tail,) enlisted in the army, and went abroad, at the age of fourteen. [418]

Abrey having purchased the lease became acquainted with its value; and Thomas Wood the younger, having, in 1807, returned from abroad as a common serjeant, Abrey, knowing the distressed circumstances of Wood the father, and his son, offered to become the purchaser of the estate (subject to the encumbrances) for 400*l.*

The two Woods being unacquainted with the value of the estate, and in distress, complied with the proposal; and on the 12th December, 1807, they entered into a written contract, whereby, in consideration of 5*l.* then paid, and of 395*l.* agreed to be paid upon a good title to the estate being made, and in consideration of the two annuities of 40*l.* and 10*l.* payable during the life of Wood the father, they, Wood the father and son, agreed to convey and surrender said freehold and copyhold lands to the defendant and his heirs, and to suffer recoveries of the same; and it was farther agreed, that the Woods should pay the expenses attending the sale, as well of making out a good title to the estate, as of all fines and fees on the survivor, and admission to the copyhold parts, and of the recoveries to be suffered in the Manor Court and in the Court of Common Pleas, and of the conveyance of the estate to the defendant.

The agreement was prepared by the solicitor of the defendant, no person acting on behalf of the Woods, *and no draft of the agreement was sent to them previous to their execution of the same. [*419]

The defendant's solicitor acted as attorney for the Woods and

WOOD
v.
ABBREY.

the defendant; and having approved of the title, indentures of lease and release for the conveyance of the freehold estate were ingrossed, and a time appointed for the execution, and for surrendering the copyhold estate, and for the defendant's admission to the same.

On the 10th September, 1808, Thomas Wood the younger was admitted, at a special Court holden for the manor, to the remainder of the copyhold estate expectant on the death of his father, and he then, together with his father, surrendered the same to the use of the defendant's solicitor to make a tenant to the *præcipe*, and a recovery was suffered in the manor Court, and the defendant was admitted to him, his heirs and assigns for ever, and the fine, 52*l.* 10*s.*, was paid by the Woods. A recovery was also suffered in Trinity Term 1808, of the freehold part of the estate; and shortly after, the lease and release were executed by the Woods, without any person having inspected the same on their behalf.

On the execution of the deeds, the defendant's solicitor produced an account, whereby it appeared that the balance of the purchase-money, after deducting the expenses of making out the title, and of preparing the conveyances and suffering recoveries, and a sum of 51*l.* stated to have been advanced to the Woods, amounted to the sum of 184*l.*; which sum, together with the 51*l.*, were the only sums paid for the purchase of the estate.

[420]

Upon the execution of the indentures of lease and release, the defendant entered into possession of the freehold and copyhold estates.

Wood the younger again went abroad, and was killed in January, 1809, and died intestate and without issue, leaving the plaintiff, his elder brother and heir at law, surviving.

Wood the father died in November, 1812, leaving the plaintiff, his heir at law.

The bill stating the foregoing facts, farther stated, that the conveyances and recoveries were obtained by fraudulent representations made to the Woods, and by taking advantage of their distressed circumstances, and that the purchase-money for the estate was grossly inadequate.

The prayer of the bill was, that the conveyances of the estate

to the defendant might be declared to have been fraudulently obtained, and might be decreed to be set aside, and that the defendant might be decreed to deliver up to the plaintiff the indentures of lease and release, to be cancelled, and that the defendant might be declared a trustee for the plaintiff in respect of the estate and premises; and that on payment to him by the plaintiff of all sums of money actually paid by him to Wood, the younger, for the purchase of the estate expectant upon the decease of the plaintiff's late father, Thomas Wood, the defendant might be decreed to re-convey the freehold part of the estate, and to surrender the copyhold part thereof to the plaintiff and his heirs, or as he should direct, and to deliver up all the title and *other deeds, papers, evidences and writings relating to the same; and that an account might be decreed to be taken of the rents and profits of the freehold and copyhold estates received by the defendant since the death of the plaintiff's late father, and that the defendant might be decreed to pay to the plaintiff, what, on the taking of the account, should appear to be due; and that a receiver might be appointed in the usual manner to receive the rents and profits of the estate, and that the defendant might be restrained by injunction from receiving the same.

WOOD
v.
ABBREY.

[*421]

The defendant, by his answer, admitted the Woods were in straitened circumstances, and that Wood the father was reduced to such penury as to obtain his livelihood as a porter, but he denied he took advantage of their distress; the offer to sell the estate for 400*l.* being made by them; and that Wood the father was acquainted with the value of the estate, and had tried, but unsuccessfully, to get more for it from others. He admitted he purchased of the assignees of Robert Mason, the lease, together with a policy of assurance for payment of 500*l.* on the death of Thomas Wood the younger. He farther stated, that before he entered into the contract, he had paid to Wood the younger 100*l.* as a consideration for confirming and making absolute the lease of the premises for twenty-one years, which before the confirmation was determinable on the death of Wood the elder:—That the agreement for the sale of the estates, was, by the desire of the Woods, sent up to London, and was signed

WOOD
f.
ABBEY.

[*422]

by the Woods at the house of the agent of the defendant's solicitor, in his and his clerk's presence, and the 5*l.* paid them :— That he is a fair and *bonâ fide* purchaser for a valuable consideration : *That in case the premises had been unencumbered by the lease, and two annuities of 40*l.* and 10*l.*, they would not have been worth more than 13 or 1,400*l.* :—That he has made no profits from the estate since the purchase, and has expended a considerable sum in repairs and buildings.

The answer was replied to, and many witnesses were examined on each side, as to the adequacy of the price given for the estates by the defendant ; the result of which evidence, as it affected the mind of the Court, is stated in his Honor's judgment.

Mr. Fonblanque, Mr. Bell, and Mr. Pugh, for the plaintiff.

Mr. — for the defendant.

THE VICE-CHANCELLOR (after a brief statement of the case) :

The plaintiff's counsel first insisted, that he was entitled to be relieved on the ground of the purchase being of a reversion, unless the defendant could show that the purchase was for an adequate consideration.

[*423]

The policy of this rule, as to reversions, may be well doubted ; and if the cases were looked into, it might be found that the rule was originally referred only to expectant heirs, and not to reversionsers. But the rule has no application here. It proceeds upon the notion that he who has only a future interest to sell does not meet a purchaser upon equal terms. But here the father, tenant for life, and his son, tenant in tail in remainder, concurring together to sell the estates, form a vendor with a present interest, and *meet a purchaser with the same advantages as if a single person had the whole power over the estate.

With respect to value, mere inadequacy of price is of no more weight in equity than at law. If a man who meets his purchaser on equal terms, negligently sells his estate at an under value, he has no title to relief in equity. But a court of equity will inquire whether the parties really did meet on equal terms ; and if it be found that the vendor was in distressed circumstances,

and that advantage was taken of that distress, it will avoid the contract. In the present case, the distress of the vendors is out of all doubt. [His Honor then mentioned the evidence respecting their situation.]

WOOD
v.
ABBET,

It appears also that the Woods had not the benefit of any professional assistance; and that the only professional person employed was the defendant's attorney.

It appears farther, that the price paid was grossly inadequate. According to the evidence of Mr. Morgan and the other witnesses for the plaintiff, the defendant bought for 400*l.* what was worth 1,600*l.*; and if I were to give implicit credit to the defendant's witnesses, still, according, to their valuation, the estate was worth greatly more than the purchase-money. But their evidence is grounded on inadmissible premises. It is made on the supposition that the estate was out of repair. But the lessee, who is the purchaser, was bound by covenant to keep it in repair.

I consider, therefore, this plaintiff entitled to relief, not on the ground of its being the sale of a reversion, but because the purchase was made at an inadequate price from vendors who were in great distress, and without the intervention of any other professional assistance than the purchaser's attorney; and because these circumstances are evidence that in this purchase advantage was taken of the distress of the vendors. The conveyances must be set aside, upon the plaintiff repaying the amount of the purchase-money, and the expenses of the recovery, with interest at five per cent.; and although, I cannot, after the cases which have been decided, make the defendant pay costs, I cannot bring my mind to give to a defendant the costs of a suit made necessary by his unfair dealing.

[424]

1818.
Dec. 15.

LEACH, V.-C.

[457]

JOHNSTON v. SWANN.†

(3 Maddock, 457—467.)

A bequest of 7,100*l.* to be laid out in the funds, and the interest and dividends to be applied in providing a proper school-house, held to be a good charitable bequest, as a school-house might be hired. A bequest of residue for the benefit of such public and private charities as the executors may think fit, and amongst others to establish a life-boat at Brighthelmstone, held good; but that money on mortgage and a lease did not pass, as being void under the statute, but that fixtures in the house, which was on lease formed part of the residue and passed.

SWANN DOWNER, of Aldermanbury, London, Gent. by his will, 17th day of January, 1811, after several devises and bequests, therein mentioned, and a bequest to the plaintiffs, the executors of his will, of 300*l.* each, and also a mourning ring to each of them, of the value of three guineas, in consideration of the trouble they might have in the execution of his will, and of the trusts thereby reposed in them, bequeathed as follows: “I direct my executors, with all convenient speed, to lay out and invest the sum of 7,100*l.* of lawful money of Great Britain, part of my personal estate, in Government funds or securities, in the names of the minister for the time being of the parish of Brighthelmstone aforesaid, and such three other inhabitants of the said parish as to my said executors in their discretion shall appear to be substantial and respectable persons, to hold the same as trustees for the purposes hereinafter mentioned; and I direct that the said minister and other trustees do and shall, jointly and in concurrence with the churchwardens and overseers of the *said parish for the time being, from time to time pay, apply and dispose of the interest and dividends of such funds or securities in manner and for the purposes following, (that is to say); first, in paying the expenses of providing a proper school-house for the instructing of twenty poor girls of the said parish in needle-work, reading and writing; such expense of providing a school not to exceed the annual interest and dividends of so much or such part of the stocks or funds wherein the said 7,100*l.* shall be invested, as at the time of such investment shall

[*458]

† This case is not applicable to the wills of testators dying after the passing of the Mortmain and

Charitable Uses Act, 1891 (5 August, 1891).—O. A. S.

be of the value of 600*l.* of lawful money of Great Britain.
 * * * The testator, after making several other bequests,
 “gave and bequeathed all the residue of his personal estate and
 effects unto plaintiffs, and the survivors and survivor of them,
 and his executors, administrators, upon trust, to pay and apply
 the same, within two years next after his decease, for the benefit
 of such public or private charities, as they in their discretion
 might think fit; and amongst other things, to establish a life-
 boat for the use of the town of Brighton, if they should think
 fit to establish the same, but not otherwise;” and he appointed
 the plaintiffs, executors of his will.

JOHNSTON
 v.
 SWANN.
 [464]

The bill, stating the will, farther stated, that the testator died
 and left the defendant Mary Swann his heir at law, and she, and
 the defendant Pollard, (and some other persons whom the
 plaintiffs were unable to discover,) his next of kin. The plaintiffs
 proved the will.

The prayer of the bill, was for an account of the personal
 estate and effects of the testator, and of his *debts, legacies, &c.;
 and that the rights of the parties might be ascertained; and
 that the trusts of the will might be carried into execution; and
 that all proper directions might be given for the due application
 of the funds agreeably to the will of the testator.

[*465]

The defendant Mary Swann, by her answer, submitted to the
 Court, whether the personal estate and effects of the testator
 passed by his will, to the several charitable purposes in the bill
 mentioned; and she, and the defendant Pollard also, by their
 answer, claimed as next of kin.

By the decree in the cause, 12th June, 1818, accounts were
 directed of the testator's personal estate, and of the debts, &c.
 with the usual directions, and a direction was made, to inquire
 what was the nature of the several legacies.

The cause now came on upon farther directions, upon the
 Master's report.

The *Solicitor-General*, on behalf of the *Attorney-General*;
 and Mr. Hart, on behalf of the plaintiffs:

The charitable bequests are good, except as to 1,000*l.* of the
 residue, which being due on mortgage, cannot pass, but goes to
 the next of kin.

JOHNSTON
v.
SWANN.

The establishment of a life-boat at Brightelmstone, if judged expedient, is a charitable purpose, and as effectual as a bequest for the improvement of the city of Bath, which was established as a charity.

[*466]

The bequest also, of the sum of 7,100*l.* for keeping *a school, and providing for the payment of the rent of such school, is good; though a bequest of money to be applied for the purpose of acquiring an interest in a school, or of land to build a school, would be within the statute: the testator meant merely, that a place for the school should be hired, for only the dividends are made applicable for providing of a proper school-house. That lands may be hired for a charitable purpose was decided in *Gastril v. Baker*, which case is cited in *Vaughan v. Farrer*.†

Mr. Agar, and *Mr. Parker*, for the next of kin :

The direction in the will, out of the interest and dividends to provide a proper school-house, must mean the purchase of land on which to build a school-house, and is therefore a void bequest under the Mortmain Act. * * *

If the testator had meant that land should be hired for a school-house, he would have said so. If he had so directed, would that have been valid? It is allowable to a testator to order a sum to be applied in the hiring of a house for a school, on a lease for 999 years, or a longer term? Would not that be within the mischief intended to be remedied by the statute?

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THE VICE-CHANCELLOR :

With respect to the school, the single question is, whether, to execute the expressed purpose of the testator, land must be purchased for erecting a school. The testator has directed only, that a proper school-house should be provided, which may be by hire; and it is some evidence of his intent that land should not be bought, that the trustees are only to apply the dividends, and no part of the principal, to the expense of providing a school-house. It is said, he meant the charity to continue for ever; but this intent may be executed, without necessity for the purchase of land.

† 2 Ves. Sen.

The gift of the residue is a valid charitable donation; but the 1,000*l.*, part of the residue due on mortgage, does not pass, being a void gift under the statute. This goes to the next of kin. So the lease belonging to the testator, which was sold for 20*l.*, goes, for the same reason, to the next of kin. With respect to the fixtures, it is admitted, that the testator had a right to remove them; and being therefore mere personal chattels, they form part of the residue, and pass under the bequest of the residue for the charitable purposes.

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ATTORNEY-GENERAL v. DUKE OF MARLBOROUGH.

(3 Maddock, 498—549.)

1818.
Dec. 18, 19,
21, 24.

LEACH, V.-C.
[498]

A tenant in tail restrained by statute from barring issue and those in remainder, is not thereby brought within the principle of equitable waste.

The Duke of Marlborough, for the time being, is, under the Act of the 5th Anne, c. 3, bound to maintain Blenheim House, and is not therefore at liberty to cut trees, which are essential to its ornament or shelter.

*[In this case, reported at great length in 3 Maddock, it is thought sufficient to retain the following passages from the judgment bearing upon the points stated in the above head-note.

The question raised by demurrer to this information and bill was whether the Duke of Marlborough could cut ornamental timber upon the estate annexed by inalienable statutory entail to the Dukedom.

THE VICE-CHANCELLOR (after referring to the statute which created the entail, 5 Anne, c. 3) said]: My opinion is, that the issue of the Duke of Marlborough were, by the statute, successively made tenants in tail of this property; and that they have all the legal rights and incidents which belong to an estate of this character, except where such rights and incidents are specially qualified by the provisions of the statute; and that there being no qualification with respect to the right *of cutting timber, they are as much the legal owners of the timber upon this property, as

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if they were tenants in fee simple. It remains to be considered, whether there is a principle of jurisdiction in a court of equity to restrain the legal incidents of an estate tail, with respect to timber, either because the estate tail cannot be barred, or because the reversion is in the Crown? Abstractedly considered, it would seem to be a singular proposition to state, that if a tenant in tail, without the power of barring the successor, has by law a right to deal as he pleases with the building and the timber upon his estate, that a court of equity can assume a jurisdiction to alter the law and deprive the tenant in tail of the legal incidents of his estate; that if the law makes a tenant in tail absolute owner of the timber, a court of equity, which is bound to follow the law, is to make a new law, and to say, that a tenant in tail shall not be the absolute owner of the timber. But whatever objection there might be, abstractedly considered, to such a principle, yet if in a long course of proceeding, evinced by precedents and records, and sanctioned, as it were, by common consent, such a jurisdiction has, in this particular case, been exercised by successive Judges, I agree that it is now too late to inquire into the origin of that jurisdiction. It is pressed upon the Court, that there is a course of precedents which necessarily establish a jurisdiction to that extent. It is not, however, alleged that such a jurisdiction has ever been actually exercised in the particular case of a tenant in tail, whose estate is not barrable, but that it has been exercised in analogous cases. The great body of authorities relate to the case of tenant for life, without impeachment of waste; but it is to be observed, that the ownership of the timber is not a legal incident to the estate of tenant for life. He takes his interest in the timber by the provision of the *grantor; and courts of equity seem to have interfered upon the construction and intention of the grant—to have considered that the grantor meant to confer a full power of temporary enjoyment, without the power of destroying or altering the character of that property, which he had limited over in succession to others. In the case of *Robinson v. Lytton*, Lord HARDWICKE expressly grounded his interference upon the intention of the testator, and upon the circumstance, that the heir was a trustee for other persons,† and the injunction was

[*538]

† See 7 R. R. 411 (10 Ves. 276).

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not confined to equitable waste. The case of a Bishop bears no application, for there a court of law will interfere by prohibition. *Knight v. Mosely* † was not a case of equitable waste. The case of a tenant in tail, after possibility of issue extinct, is, however, urged as being altogether in point; and there is, certainly, authority that such a tenant in tail has been considered within the principle of equitable waste. The common case of a tenant in tail after possibility of issue is extinct, is where the estate is descendible to the issue of the wife alone: until the death of the wife without issue, this estate has all the legal incidents of other estates tail; but upon the death of the wife without issue, the estate has no longer a descendible quality, and the husband's interest, is, in effect, limited to his life. His estate becomes ranked in the law amongst estates for life; and he may make exchange with a mere tenant for life. In *Lewis Bowles's* case, ‡ however, it was held at law, that as he had, before the death of his wife, an estate tail, and was once owner of the timber, that notwithstanding the death of his wife, and the change in the quality of his estate, he should still continue unimpeachable *of waste. In a court of law, therefore, a tenant in tail after possibility of issue extinct, is, in effect, a tenant for life without impeachment of waste; and courts of equity have, in the question of equitable waste, confounded him with other tenants for life without impeachment of waste, and have not entered into the distinction, that he is unimpeachable of waste, not by the provision of a grantor, but as a legal incident to his estate. If, however, this question as to the tenant in tail after possibility of issue extinct, is now to be considered as the settled doctrine of the Court, it is not in point to the present case: the Duke of Marlborough is not at law tenant for life without impeachment of waste. The case of tenant in tail, without the power of barring his issue, is common to every case where the reversion is in the Crown; and no instance can be stated in which a court of equity has ever interfered against such a tenant in tail, upon the principle of equitable waste. I cannot feel myself at liberty, therefore, to extend this juris-

[*539]

† Amb. 176.

‡ 11 Co. Rep. 79.

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diction of a court of equity beyond the limits of all former precedent. * * *

THE VICE-CHANCELLOR :

Dec. 21.

[541]

Since we last met, an Act of Parliament has occurred to me not mentioned in the pleadings, or insisted upon in the argument ; I mean the Act of the 5 Anne, c. 4, by which a pension is settled on the Duke of Marlborough, and his posterity, out of the revenues of the Post Office. It appears to me, upon reading that Act, together with the two other Acts stated in the pleadings, that there is reason for contending, on other principles than those of equitable waste, that the public has an interest in the house of Blenheim, which every court of Justice is bound to protect. The Act of the 5 Anne, c. 4, is a public Act to which the Court is bound to advert.

[At the suggestion of the VICE-CHANCELLOR, the case was reargued as to the question, whether the Legislature have not imposed upon the successive members of this family, an obligation to maintain the house of Blenheim.]

Dec. 24.

THE VICE-CHANCELLOR :

[545]

The Duke of Marlborough is charged by the information and bill, with committing acts of waste and destruction, by cutting timber ornamental to the mansion-house,† park, and estate, or which otherwise afforded shelter to the mansion-house, and trees in lines and avenues, as well as timber of an improper growth ; and that he had contracted to cut down more timber of the same description, which was marked out to be cut down ; and states also, that he intends to commit other acts of wanton and improvident waste. I take these latter words to mean, waste and destruction upon the estate *ejusdem generis* as that before mentioned, that is, by cutting timber. The Duke's demurrer, therefore, admitting, *for the purpose of the argument, the statement of the bill, and insisting that he has a right to do all that is alleged ; does, in effect, insist upon an unrestrained

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† Blenheim House and Woodstock of Parliament to the Dukedom. See Manor and Estate, annexed by Act judgment, *post*, pp.278,279.—O. A. S.

right to cut timber. I am of opinion, that if the Duke is bound to maintain the house of Blenheim, he has not an unrestrained right to cut timber, but must maintain also all timber which is essential to the ornament or shelter of the house; and that the state of this record necessarily involves the question whether the statute does restrain the Duke from the destruction of Blenheim House. The next consideration is, whether there is plain expression or necessary implication, that it was the intention of the Legislature that the house of Blenheim should be maintained, in all times, as the residence of the family, although, with respect to the estate generally, the legal rights of tenant in tail were given to those who were successively to enjoy the honours and dignities of the family, except where those rights are specially qualified or restrained? The Duke of Marlborough, by the Act of the 4 Anne, received from the public gratitude, through the grant of the Crown, the honours, manors and estate of Woodstock, in fee simple; and we find in the preamble of the Act that he received it as a reward for his eminent national services. At this time the Duke of Marlborough had not the titles as at present limited, but the titles were limited in the ordinary course, descendible only to the heirs male of his body; but it was afterwards considered by the Sovereign and Parliament to be fit that this illustrious person should have this pre-eminent distinction, that all the dignities successively granted to him should be limited to every possible issue that might descend from his body. When these honours were about to be conferred, the Duke became *desirous (for so it appears upon the recital of the next Act of Parliament) that the estate which had been granted to him in respect of his national services, should be annexed to those dignities which were at all times to descend to his posterity, for the purpose of maintaining and supporting them; and the Sovereign and the Parliament, upon this special occasion, consented to depart from that principle of legal policy which forbids the making of estates inalienable. The Act of the 5 Anne, c. 8, was passed for both purposes, and the title of that Act runs thus; "An Act for the settling the dignities and honours of John Duke of Marlborough upon his posterity, and annexing the honours and manor of Woodstock and house of Blenheim to go along with the said

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honours." And then the Act recites that it appeared to the Queen that it would be proper that the honour and manor of Woodstock, and the house of Blenheim should always go along with the titles, and she did therefore recommend the matter to the consideration of Parliament. The Act then proceeds to grant the honours and dignities to all possible issue of the Duke, and to annex to those honours the manor and park of Woodstock, and the house then erecting there, called Blenheim, and all the estate which was granted to the Duke in fee simple, in pursuance of the 3rd and 4th Anne.

[*548]

The next statute of the 5th Anne, c. 4, which was not noticed in the former pleadings, nor in the first argument, recites this important fact, that the house of Blenheim was erected at the Queen's expense, as a monument of the Duke's glorious actions ; and proceeds to settle a pension of 5,000*l.* a-year from the Post Office, upon the Duke and his posterity, for the *more honourable support of their dignities, in like manner as his honours, and the honour and manor of Woodstock, and the house of Blenheim, were already limited and settled. The question then is, taking these three Acts together, whether the Legislature meant by the 5th Anne, c. 3, so to annex this house of Blenheim, thus built at the public expense, and as a national monument, to the honours and dignities, that it should, as a distinct subject, descend in all times as a suitable residence for those who enjoyed such pre-eminent distinctions ; or, whether it was meant to be confounded with the rest of the estate, and that the possessors for the time being were to have the same rights of property over it, as, in their character of tenants in tail, they would necessarily have over the other parts of the estate ? I cannot read these several Acts, and attend to the circumstances of this property, and observe the manner and purpose of building this house of Blenheim, and the special annexation of it to the honours and dignities of this family, so particularly recited in the last Act, without stating that there appears to me to be clear and necessary implication that it was the intention of the Legislature that the house of Blenheim should in all times, as a distinct subject, descend and be enjoyed with the honours and dignities of this family ; and that it was not the intention of the

Legislature that the successive possessors of these honours and dignities should have the rights of property over it, which, with respect to the rest of the estate, were legally incident to their character of tenant in tail. I think the Legislature thus imposed upon every possessor of these honours and dignities, the obligation to maintain the house of Blenheim for the future residence of those to whom the succession was limited; and that this *Court is bound to interfere to prevent its destruction. I am clearly of opinion, that the Duke of Marlborough having no power of destruction over the house, has no power of destruction over timber which is essential to the shelter or ornament of the house; and I must overrule a demurrer which, in effect, insists upon an absolute and unqualified right to cut all timber.

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It does not, however, follow that the absurdity is now to take place which would have taken place if the case could have been supported upon the principle of equitable waste—that the taste of the first proprietor must in all times remain impressed upon the property. It does not follow, that because it was the intention of the Legislature to compel the successive Dukes of Marlborough to maintain the house of Blenheim, that therefore it was the intention of the Legislature that they should enjoy the property without the elegancies and conveniences which belong to the change of times. The Court will distinguish between improvement and destruction. If any act be done by the Duke, which the remainder-man shall consider as tending to destruction, the Court will decide upon the quality of the act complained of. But in the present state of the case, it is not necessary to say by anticipation, what may or may not be so considered.

Demurrer overruled.

[Upon a subsequent application by the Duke (reported in 5 Maddock, 280-2) an enquiry was directed whether any and what timber or other trees standing or growing for the shelter or ornament of Blenheim House might be cut with advantage to the ornamental character of the gardens, park, &c.]

1820.
Dec. 23.

K. B. HILARY TERM.

SICKLEMORE *v.* THISTLETON.

(6 M. & S. 9—14.)

1817.
Jan. 23.

[9]

Lease by plaintiff to J. T. for years of a messuage and farm, at a yearly rent, payable quarterly, and J. T. covenants to pay the rent on the days and in manner therein mentioned, and also to pay interest in case the rent should be behind three quarters; and defendant covenants that J. T. shall at all times during the term, well and truly pay to plaintiff the said rent on the respective days, and also interest, and shall duly observe all the covenants, and that in case J. T. should neglect to pay the rent for forty days, defendant shall pay on demand: Held, that the defendant was not chargeable until after forty days and demand made.

COVENANT. The plaintiff declares upon a lease made between himself of the first part, James Thistleton the younger of the second part, and the defendant of the third part; by which the plaintiff, for the considerations therein mentioned, demised to Thistleton the younger a certain messuage and farm in Walpole Saint Peter's for seven years, at the yearly rent of 190*l.*, payable quarterly, and also the farther yearly rent of 40*l.*, and so in proportion, for every acre ploughed contrary to the course of husbandry prescribed in the indenture; and Thistleton the younger, for himself, his heirs, executors, and administrators, covenanted to pay the rent on the days and in manner therein mentioned, and also to pay interest, in case the rent should be behind three quarters; and to keep the premises in tenantable repair, and not to carry off any of the produce, and to manage the farm in a husband-like manner, &c. And the defendant, for himself, his heirs, executors, and administrators, covenanted with the plaintiff, his heirs and assign, that Thistleton the younger, his executors and administrators, should at all times during the term well and truly pay, or cause to be paid, to the plaintiff, his heirs and assigns, the said rents, on the respective days mentioned *in the indenture, and also interest; and should duly observe and perform all the covenants on his and their

[*10]

part to be observed and performed. And the plaintiff alleges that Thistleton the younger entered, and that on, &c. 287*l.* 10*s.* of the said rent of 190*l.* for one year and a quarter, was and still is in arrear. Secondly, that on, &c. three quarters of the said rent of 190*l.* were and still are unpaid, whereby Thistleton the younger became liable to pay interest, &c.; and there were other breaches assigned, as for non-repair, and for carrying off manure, &c. And so the plaintiff says that the defendant, although often requested, hath not kept the covenants, &c.

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After oyer, and pleading to issue, and a verdict for the plaintiff at the Norfolk assizes with general damages upon the whole declaration, it was moved in arrest of judgment, that the breach for non-payment of rent was not well assigned, being for non-payment of rent generally by Thistleton the younger, as if the defendant's covenant were absolute in this respect; whereas it appears on oyer, that the lease contains this clause, viz. "that in case Thistleton the younger should neglect to pay the rent, &c. for forty days, the defendant shall pay on demand;" the force of which is, to make the defendant only liable conditionally, that is, after a time certain, and upon request; so that this assignment, instead of being general for rent in arrear, should have been, that Thistleton the younger neglected to pay it for forty days, and the defendant was requested to pay it; for without this, he is not chargeable according to the true intent and meaning of the lease. * * *

Blosset, Serjt. and *Platt*, who shewed cause, denied that the covenant was qualified. * * *

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LORD ELLENBOROUGH, Ch. J. :

I own that I cannot help thinking this is a qualified covenant, and that the *stipulation, that "if the lessee shall neglect to pay for forty days, the surety shall pay on demand," which must have been introduced in ease and for the protection of the surety, does, in reasonable construction, pervade and restrain the former covenant. According to the authority of *Browning v. Wright*,† covenants ought to be construed with due regard to the intention

[*12]

† 5 R. R. 321 (2 Bos. & P. 13).

SICKLEMORE of the parties as it is to be collected from the whole context of
 THISTLETON. ^{r.} the instrument, so as to make one entire and consistent construction of the whole; and it appears to me, that that would not be a consistent or just construction of this instrument, which would have the effect of making the defendant, who is only a surety, liable in the first instance, without notice, immediately upon the rent becoming due. It would therefore be contrary to the rule laid down in *Browning v. Wright* not to give effect to the qualifying and narrowing words. This breach therefore is, in my opinion, ill assigned; and being so, the damages, which are entire, cannot stand, because of the uncertainty as to what portion of them is to be separated and applied to the several breaches on which the verdict rests, so that the Court has no means of apportioning them, and can only arrest the judgment.

BAYLEY, J. :

[*13] It is not possible to doubt that the latter clause, as it regards the surety, is a qualification of the former. Covenants must necessarily be construed altogether in order to attain their true meaning. The meaning of these covenants is, that the defendant does not become chargeable *eo instanti* the rent becomes due, but only after forty days' non-payment, and after *demand made. If this were not so, the consequence would be, that he would be subject to two actions, one on the day after the rent became due, and another after forty days and demand made. Upon the other point, as to the distinction that has been taken between entire damages on separate breaches and separate counts, it seems as if there ought to be none in point of law; but I shall look to the cases between this and to-morrow, to ascertain if there be any; as at present advised, it seems to me that there is not any distinction.

HOLROYD, J. † :

In this case different breaches are alleged; one for non-payment of rent, another for carrying off straw from the premises. Upon these, the jury were to decide whether they were true in fact, and if they were, what damages the plaintiff had thereby

† Abbott, J. had left the Court.

sustained. It was not their province to determine whether the breaches were according to the legal construction of the lease properly alleged. The question, then, is this, whether the jury, having found a verdict on all the facts, and given damages thereon, can be considered as having determined upon the legality of the causes of action, over which they have no authority, and which, as it now appears, could only be settled after a nice discussion of the rules of law which govern such actions. If, then, the question be for the Court, upon the true construction of this lease, I am bound to say that, considering the two covenants together, and their object, and the consequences that would follow from giving a literal construction to one of them, I must presume the intention of the parties to have been, that the one should *qualify the other. In *Trenchard v. Hoskins*,† it is said, “every deed ought to be construed according to the intention of the parties, and the intents ought to be adjudged of the several parts of the deed, as a general issue out of the evidence, and intent ought to be picked out of every part, and not out of one word only.” And I will add, in the words of that report, “I grant these are several covenants in point of fact, but not in point of obligation;” and the intent, and not the form, is what we are to look to. Here, then, the intent was, that the surety was not to be liable for forty days after non-payment of the rent, nor until it was demanded of him.

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[*14]

Rule absolute.

† Winch, Rep. 93, per HOBART, Ch. J.

1817.
Jan. 23.

BOYSON & OTHERS v. THOMAS COLES.†

(6 M. & S. 14—28.)

[14]

Plaintiffs, having gums for sale warehoused in their names at the London Docks, received from C., a broker, a sold note, not disclosing the name of any purchaser, and gave C. an order on the Docks for the weighing and transfer of the gums to his order, and sent him an invoice as for gums bought of them by C., and having called upon him to settle for the gums as per contract, drew on H. for the price, which bills were accepted by H., and guaranteed by C., who afterwards pledged the gums for a valuable consideration to defendant, handing over to him the transfer order of plaintiffs, together with a transfer order from himself, and afterwards, and before the bills became due, became bankrupt: Held, that plaintiffs were entitled to maintain trover against defendant for the gums.

TROVER for a quantity of gum Senegal. Plea, not guilty. At the trial before Lord ELLENBOROUGH, Ch. J. at the London sittings after last Easter Term, the case, as it appeared in evidence, was thus:—

[*15]

The gums were consigned to the plaintiffs Boyson, Joseph and James Silver, per ship *Echo*, and were warehoused *in their names at the London Docks previously to the month of June, 1815. On the 2nd of that month Coles, Brothers, who carried on business in London chiefly as brokers, and had applied two or three times to the plaintiffs respecting these gums, delivered to the plaintiffs a sold note in the following terms: “Sold for account of Messrs. Joseph and James Silver about forty tons of rough gum Senegal, per *Echo*, at 77s. per cwt., fourteen days four months or 2½ per cent. discount. London, 2nd June, 1815. (Signed) COLES, BROTHERS.” On the 15th of the same month the plaintiffs gave to Coles, Brothers, an order signed by Joseph and James Silver, addressed to the superintendent at the docks, to weigh and transfer the gums to the order of Coles, Brothers; and the transfer was accordingly made on the 16th into their names in the Dock Company’s books, and the dock charges paid

† There is no doubt that in such a case as the above, the pawnee would come within the protection of the Factors Act, 1889. It may be doubted whether he would have been so under any of the earlier Acts (see *Johnson*

v. *Crédit Lyonnais Co.* (1877) 3 C. P. D. 32, 47 L. J. C. P. 241). At all events the decision is an important one upon the doctrine of the common law, which is necessary to an understanding of the statute.—R. C.

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to that time by the plaintiffs. On the 24th the plaintiffs sent an invoice or bill of parcels of the whole 94 casks to Coles, Brothers, dated the 8th June, and headed, "Messrs. Coles, Brothers, bought of Joseph and James Silver." On the 26th Boyson wrote to Coles, Brothers, requesting them to settle for the gums agreeably to contract, and stating that he would call the next day for that purpose; and on the 27th the plaintiffs drew on Heseltine & Co. for the amount, at four months, antedating the bills to the 16th, which bills were accepted; and Coles, Brothers, wrote a letter to the plaintiffs guaranteeing the payment of them. On the 4th July, Coles, Brothers, being in embarrassed circumstances, and having obtained the defendant's guarantee of certain promissory notes of theirs in the hands of Messrs. Barclay and Tritton, to a much larger amount than the value of the gums, in order to cover this guarantee *handed to the defendant the lease of their premises, together with certain policies on their lives, and the transfer order above stated, accompanied by an order from themselves to the superintendent of the Docks to transfer the gums to the defendant's order. Coles, Brothers, a few days after this transaction, became bankrupt, and the plaintiffs put in a claim under their commission for the price of the gums. The clerk of the plaintiffs proved that Coles, Brothers, were known to him only as brokers, and that the sold note delivered by them to the plaintiffs was in the usual form of a broker's note, where the name of the buyer is not disclosed, and that at the time when this note was delivered the name of a purchaser was not mentioned. On the other hand, Coles, Brothers, (the bankrupt) proved that though his house dealt principally as brokers, they at times made purchases on their own account, and that they had applied for these gums in consequence of its being mentioned to them by Heseltines that the gums were in the market: and the witness denied that there was any principal, or that he ever represented that there was any to the plaintiffs. The question at the trial was, whether the defendant was entitled to hold the gums against the plaintiffs; which question his Lordship left to the consideration of the jury, on these points, viz. whether the plaintiffs had dealt with Coles, Brothers, as brokers, or as

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COLES. purchasers; if as brokers, Coles, Brothers, had no right to pledge the goods to the defendant, unless the jury considered that the plaintiffs had armed them with such *indicia* of property as to enable them to deal with it to others as their own. The jury found a verdict for the plaintiffs for 2,792*l*.

[*17] In Trinity Term, a rule *nisi* for a new trial was obtained, *and the case was argued upon the rule,† by the *Attorney-General* and *Gurney* for the plaintiffs, and by *Topping*, *Marryat*, and *Cowley* for the defendant; in the course of which argument the following authorities were quoted; viz. *M'Combie v. Davies*,‡ *Martini v. Coles*,§ *Parker v. Patrick*,|| *Taylor v. Sir T. Plumer*.¶ The Court afterwards in pronouncing judgment went so fully into the several points discussed at the Bar, that any farther detail is deemed unnecessary.

LORD ELLENBOROUGH, Ch. J. :

Having given all the attention to the discussion of this case which the importance of the question, and magnitude of the stake may seem to demand, I confess that I do not see any sufficient ground for granting a new trial. Adverting to the case with reference to the documents which were exhibited to the defendant at the time when he guaranteed the notes of Coles, Brothers, I do not find that there was any bought note exhibited to him as an inducement to him to advance his security; it is represented, as the fact was, that Coles, Brothers, were in possession of an order for the transfer of the gums; and this order is accordingly handed to the defendant, together with an order from themselves for the transfer; but beyond this it was not in evidence that there was any document produced to induce the defendant to make the advance. Therefore this is not one of those cases where the pawnee has acquired a better title than the pawner, in consequence of being misled by some documents with which the pawner was armed by the proprietor. *As

[*18] suppose in this case a bought note had passed between the

† At Serjeants' Inn Hall before this Term.

‡ 8 R. R. 534 (6 East, 538; 7 East, 5).

§ 1 M. & S. 140.

|| 5 T. R. 175.

¶ 16 R. R. 361 (3 M. & S. 562).

parties, and had been exhibited to the defendant, conveying an effectual representation that the property was in Coles, Brothers, as the purchasers, the plaintiffs would doubtless have been bound by it. But the case terminates without proof of any such document having been exhibited, whereby the defendant could properly be deceived; and therefore he, as pawnee, must be content with such title as the pawner hath, whether it be good or bad; he cannot be in a better situation. Dismissing, then, this point, we come to the question as to the title of Coles, Brothers. The transaction originated in its being mentioned to Coles, Brothers, that these goods were in the market, and might be seen. Heseltine, it seems, had had an offer of the goods from Mocatta, the plaintiffs' broker, and mentioned them to Coles, Brothers. The next thing we find in evidence is that Coles, Brothers, sent in to the plaintiffs a sold note. The sold note is thus: "Sold for account of Messrs. Joseph and James Silver about 40 tons of rough gum Senegal, per *Echo*, at 77s. per cwt., fourteen days four months or 2½ per cent. discount. (Signed) COLES, BROTHERS." We find that they afterwards represented as a past fact that there had been an actual sale. Did that fact exist? Is it pretended that there was any purchaser? The note is the usual broker's note, which is delivered to the principal on whose account the broker sells. If there had been any one of whom it could be predicated that he was a purchaser, the plaintiffs could not have maintained this action, if there was a real buyer *cadit quæstio*. After having once sold the goods, the plaintiff could not have brought trover. But is there, I repeat, at this moment *any person to stand in the a place of vendee through the intervention of Coles, Brothers? If not, the account they gave was incorrect, there had not been a sale; consequently, the right of action is not affected if the property has not been transferred to some one as a buyer. But an invoice, or, as it has been called, a bought note, was sent to Coles, Brothers, not of equal date, as one should expect of a bought note, like lease and counterpart, with the sold note, nor running in the same terms; but it is addressed "Messrs. Coles, Brothers;" and it goes on: "Bought of Joseph and James Silver 92 casks gum Senegal, per *Echo*, at 77s. per cwt." And

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the price is affixed and the numbers and weight of each cask set down; and it is noted at the foot that two hogsheads were damaged. Now, is this inconsistent with what the sold note imports, that Coles, Brothers, were only the instruments for effecting the sale? Assuming that they were so, the bill of parcels must have been in this form, inasmuch as the vendee was not disclosed; and, therefore, no inference arises out of it that Coles, Brothers, had purchased in their own names as principals; and the plaintiffs' request to them to settle for the gums agreeably to contract, can only mean according to the entire contract as it really existed between them. But the sold note does, I think, unequivocally import a transaction between principal and broker, to effect through the latter a sale of the commodity. Now the main argument for the defendant rests upon the order of the plaintiffs to weigh and transfer; and if to weigh and transfer necessarily means to transfer the actual as distinguished from the potential property, or possession, this, indeed, would be a strong ground. But this was a question peculiarly fit for the consideration of the *jury; and the jury, which was a most intelligent one, have considered and determined it; and unless they are wholly in error, the question is at an end, because there is nothing to raise a doubtful inference. Coles, Brothers, never declared their principal; but it should seem as if they meant to impress the plaintiffs from the first with the supposition that they had effected a sale with some one. The credit expired on the 16th June, and on the 26th, ten days afterwards, the plaintiffs applied to Coles, Brothers, to settle for the gums agreeably to contract, which produced the bills on Heseltine, dated back to the time when the credit expired. Heseltine accepted the bills; and this circumstance imported, to a certain extent, that he was a party interested. The evidence, however, negatived that he was a principal, or bought or had any interest in the goods; or that his acceptances were other than purely for accommodation; and the acceptances will certainly not of themselves make him a purchaser. But it is said that Coles, Brothers, gave their guarantee, and thence it is deduced that they were purchasers. It would, doubtless, be somewhat out of the usual course for a man to guarantee his

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own debt; to guarantee the debt of another may be to confer the very valuable advantage of additional security; but it can add nothing to the security where the person who guarantees is already liable. The inference, therefore, to be drawn from this circumstance rather is, that Coles, Brothers, were not purchasers. Where then are we to look, except it be to the dock transfers, upon which I have already observed, to the circumstance which was to indicate to the plaintiffs that Coles, Brothers, were the purchasers? Coles, Brothers, do not declare themselves as such, and the sold note *imports the contrary. But if the plaintiffs were not divested of the property in these gums by any thing which passed with Coles, Brothers, the defendant, who is a pawnee, cannot have a better title than the pawner; and it is properly admitted that the defendant claims to hold only as a pledge. The action then is against a defendant who claims to hold under a defective title. No imputation lies upon him, nor any disparagement from this transaction; in point of prudence he might, perhaps, have secured himself by a more cautious proceeding; he would probably have ascertained, had he pursued the enquiry from the London Docks, how it was that Coles, Brothers, had acquired a right to make the transfer, and how the transaction stood precisely between them and the plaintiffs; as it now is, he rests upon a title which is defective.

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[*21]

[BAYLEY, J., ABBOTT, J., and HOLROYD, J., delivered judgments substantially in accordance with that of Lord ELLENBOROUGH; and the rule was accordingly]

Discharged.

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Jan. 23.

[29]

DAVIS v. NOAKE.

(6 M. & S. 29—34 ; S. C. 1 Stark. 377.)

Where plaintiff declared, in case for a malicious prosecution, that defendant maliciously, &c. charged the plaintiff with having feloniously stolen certain articles, his property, and it was proved that defendant laid an information before a magistrate, in which he deposed that the said articles had been feloniously stolen, and that he suspected and believed, and had good reason to suspect and believe that they had been stolen by the plaintiff: Held, that the evidence supported the declaration by showing a substantial charge of felony. *Dissentiente Bayley, J.*

CASE for a malicious prosecution. The plaintiff declared that the defendant appeared before J. G., one of the Justices of our lord the now King, assigned to keep the peace in and for the county of Middlesex, and falsely and maliciously, and without any reasonable or probable cause, charged the plaintiff with having feloniously stolen certain articles enumerated in the declaration, the property of the defendant, in his dwelling-house in the county of Essex. The declaration then went on to state that the defendant caused the said Justice to grant his warrant for apprehending the plaintiff, and the plaintiff to be arrested and detained under it, and to be conveyed before a magistrate, who having heard and considered all that the defendant could allege against the plaintiff touching the supposed offence, adjudged that he was not guilty, and caused him to be discharged; and that the plaintiff hath not further prosecuted his said complaint. The second count alleged that the defendant charged the plaintiff with having committed a certain offence punishable by law, to wit, felony, &c. Plea, not guilty.

At the trial before Lord ELLENBOROUGH, Ch. J., at the London sittings after last Trinity Term, it appeared that the defendant laid an information before the magistrate mentioned in the declaration, in which he deposed that his escrutoire † had been broken open, and the several *articles also mentioned in the declaration, his property, had been feloniously stolen; and that he suspected and believed, and had good reason to suspect and believe, that they had been stolen by the plaintiff. Upon this information the magistrate granted a warrant, and the plaintiff was arrested and brought before another magistrate, who called

[*30]

† Sic.

upon the defendant to make good his charge, but the complaint was ultimately dismissed.

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v.
NOAKE.

It was objected that there was a variance between the evidence and declaration; the latter alleging that an express charge of felony was made against the plaintiff, whereas according to the proof the defendant had only deposed to a suspicion that the plaintiff had committed a felony. This objection was overruled, and a verdict was found for the plaintiff. A rule *nisi* having been obtained for a new trial, *Topping* and *Espinasse* were heard against the rule, and the *Attorney-General* and *E. Lawes* in support of it.

LORD ELLENBOROUGH, Ch. J.:

I am at a loss to understand what other meaning can be imputed to the accusation made by the defendant, than that it conveyed a charge of felony. In common parlance it undoubtedly would be so understood, and the magistrate seems to have dealt with it as such. True it is that there was not any direct allegation on oath that the plaintiff had committed a felony; nor could it have been so alleged with propriety, unless the defendant had actually seen the felony committed, or had been present at the confession of it. But, nevertheless, it amounts to a charge of felony. It is stated distinctly on the information that the defendant's *escrutoire* had been broken open, and that several articles had been feloniously stolen from it; the *corpus delicti*, therefore, is positively deposed to; the informant then deposes, in like manner as every other informant who was not an eye-witness would naturally qualify his deposition, that he had good cause to believe that the plaintiff had feloniously stolen the articles. No person under the same circumstances in which the defendant stood could swear more positively to the charge; and yet we are called upon to say that this is not a charge imputing felony to the plaintiff, and inducing the magistrate to act thereon. It appears to me that there is not any variance.

[*31]

BAYLEY, J.:

I entertain considerable doubts on this point, but my present impression is that it is a variance. The foundation of the

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action is, that the party has been injured in his character, and has sustained damage in consequence of his having been charged with felony by the defendant. Now a man may prefer a charge either on the foundation of what he knows or of what he suspects. But there is a wide difference, as it regards both the accuser and the party accused, whether the charge be made on the one ground or the other. That which is founded on the accuser's own knowledge will require proof to that extent to warrant such a charge; whereas that which rests on suspicion only will be satisfied by circumstances sufficient to induce on his mind a suspicion. Suppose, then, the defendant had been bound to plead this matter specially; if the charge be of that nature as to import that it proceeds from knowledge, could he have justified by pleading circumstances which would warrant only a reasonable cause to suspect? Now the declaration alleges, that the defendant went before a magistrate, and charged the plaintiff with having feloniously *stolen his property. I may know that a person has stolen my property, either by having seen him commit the act, or by having heard him confess it; and in either of these cases the charge would proceed directly from my own knowledge; but information to a less extent might reasonably create in me a suspicion, and then the charge would proceed in a form less direct. This distinction between a direct charge and one upon suspicion only is well known, and acted upon in the practice of granting writs of habeas corpus. Here the charge, as laid in the declaration, is direct, importing, as I should infer from the mode in which it is laid, that the defendant knew the fact. When, however, we come to look at the information laid, it is no more than this, that a felony has been committed by somebody, and that the defendant has good cause to believe it was committed by the plaintiff, or, in other words, that he charges the plaintiff only on suspicion of felony. The second count is not distinguishable in this respect from the first. If I am wrong in supposing that the charge alleged in the declaration imports that which I impute to it, then my observations undoubtedly will fail. I was bound, however, to state the impression which this case had made on my mind.

ABBOTT, J. :

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I think the declaration is well enough maintained by the evidence. This is not a declaration for words spoken or written, but for an act which the plaintiff alleges the defendant to have done; namely, the preferring a charge which I consider as synonymous with accusation. The evidence is, that an information was laid before a magistrate, containing in substance that a felony had been committed, and that the informant had *good cause to suspect the plaintiff of having committed it. According to common understanding this was tantamount to charging the plaintiff with a felony; and so, it seems, the magistrate understood it. If this be so, the allegation in the declaration is satisfied by the fact. The term "*crimen felonie imposuit*" has often been translated "imposed the crime of felony;" but perhaps its more appropriate signification is, "preferred a charge of felony." An allegation that such a charge was preferred is not sustainable by proof of words imputing felony; there must be some act done; nevertheless it is not necessary to state the precise form which the charge assumes, if it be in substance a charge of felony.

[*33]

HOLROYD, J. :

I am of the same opinion. The declaration, as it seems to me, was supported by the evidence. The declaration does not allege the particulars of the charge, either written or oral, which the defendant made, only that he charged the plaintiff with felony; and we find it expressly stated in the deposition that a felony had been committed; that is spoken to positively, on the knowledge of the defendant, for the purpose of obtaining the warrant. The deposition then states no particular facts to connect the plaintiff with the commission of the offence, but alleges that the informant suspects and believes, and that he had good reason to suspect and believe that the felony had been committed by the plaintiff. The defendant therefore charges not only that he suspects, but that he has good cause to suspect. That, in common understanding and parlance, must be considered as an accusation that the plaintiff has

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committed *a felony ; because it is deposed that a felony has been committed, and the defendant has good cause to suspect the plaintiff of committing it.

Rule discharged.

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Jan. 23.

APPLETON v. LORD BRAYBROOK.

(6 M. & S. 34—39 ; S. C. 2 Stark. 6—7.)

[34]

In assumpsit on two judgments recovered in the Supreme Court of Jamaica, copies of the judgments purporting to be signed by the clerk of the Court, and certified by him to be true copies, accompanied by a certificate of a notary public of his being clerk of the said Court, and by another certificate of the governor, under the seal of the island, that the person so certifying was a notary public, were held to be inadmissible evidence to prove the judgments.

ASSUMPSIT on two judgments recovered in the Supreme Court of Jamaica. At the trial before Lord ELLENBOROUGH, Ch. J., at the London sittings after last Trinity Term, the plaintiff produced two paper writings purporting to be copies of the judgments, and subscribed at the bottom, "true copy," and signed "F. Smith, clerk ;" and the witness, who produced them, proved that the signature "F. Smith," if not the handwriting of Smith, was the handwriting of the clerk, who always signed for him in his presence. These copies were annexed to several certificates ; the first purporting to be a certificate by F. Smith, described as clerk of his Majesty's Supreme Court of Judicature, under his hand and seal of office, dated St. Jago de la Vega, the 8th December, 1814, by which he certified that the above were true copies of the original judgments, both of record in his office, and that the same were still open and unsatisfied ; the second purporting to be a certificate under the hand and seal of Robert Robertson, described as secretary and notary public, dated the 9th September, 1814, by which he certified,

[*35]

" that Francis Smith, Esq., *who had duly signed and attested the above certificate, was clerk of the Supreme Court of Judicature, duly admitted, &c. ; and that, to all acts and instruments by him signed and attested in such his capacity aforesaid, full faith and credit is and ought to be given ;" the

third purporting to be a certificate by the Duke of Manchester as Captain-General and Governor-in-chief of Jamaica, dated the 9th of December, 1814, under the broad seal of the island, certifying "that Robert Robertson, Esq., whose attestation was thereunto annexed, was secretary and notary public of his Majesty's island of Jamaica, duly admitted, &c. and that to all acts and instruments by him signed and attested, full faith and credit is and ought to be given both in judgment Court and without." The witness also proved that he had practised for many years as an attorney in Jamaica, that the Court has not any seal, and that the above was the usual mode of authenticating such judgments; but he could not state whether the copies produced were signed by Smith or by one of his clerks. It was objected, that these copies were not evidence without proving them actually examined, and upon this point leave was given to move to enter a nonsuit. A rule *nisi* having been obtained accordingly,

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 BRAYBROOK.

Scarlett and Tindal, who shewed cause, endeavoured to sustain the evidence upon the distinction, that these were copies authenticated by an officer appointed for that purpose, and to whom credit is therefore given; † like the chirograph of a fine, which is evidence of the fine, because the chirographer is appointed to give out *copies; ‡ or they might, perhaps, be considered as tantamount to exemplifications of the records of the Court.

[*36]

LORD ELLENBOROUGH, Ch. J. :

The Court, I believe, entertains no doubt that these were not copies which ought to have been received. I am not aware of a single instance in which courts of law in this country have ever acted upon such evidence. The argument for its admissibility has been fairly put upon the ground, that these are authenticated copies by an accredited officer. But is that sufficient? I know that an examined copy, or an exemplification under the seal of the Court, are the ordinary and acknowledged modes of proof; but it is said, that these copies must be admitted *ex necessitate*, as being the best evidence which the nature of the case affords.

‡ *Henry v. Adey*, 3 East, 221.

† *Gilb. Ev.* 21.

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v.
F. LORD
BRAYBROOK.

To this I answer, that if there be no seal of the court or island, an examined copy must be obtained, although copies such as these may perhaps serve well enough throughout the island. There being no instance where such evidence was ever acted upon in the Courts of this country, I think it would be extremely dangerous if we were, upon the present occasion, to relax the rule.

BAYLEY, J. :

[*37]

If this had been an exemplification of the judgment under the seal of the island, I should have thought it sufficient ; but when we look to the instrument to which the seal is appended, by way of exemplification, it appears that the seal is used, not by way of exemplifying the record, but as authenticating *the person certifying to be a notary public, to whom credit ought to be given. The argument has been put on the only ground capable of sustaining it, namely, that this was the act of an officer authorised to issue authenticated copies ; but the fact does not support the argument. This is not a case where there is a known officer whose duty it is to deliver out copies which are to form part of the title of the parties receiving them, and who does not discharge his duty until the copy has been delivered ; as in the instance of the chirograph of a fine, and of the inrolment of a deed. And therefore, what is laid down in Buller's Nisi Prius,† applies rather to the present case ; namely, that “ it is not enough to give in evidence a copy of a judgment, though it be examined by the clerk of the treasury, because it is no part of the necessary office of such clerk ; for he is only entrusted to keep the records for the benefit of all men's perusal, and not to make out copies of them.”

ABBOTT, J. :

I am of the same opinion. The seal of the island is not affixed to the copy of the judgment, so as to give it the force of an exemplification ; nor does the instrument to which the seal is affixed, in any manner refer to the judgment, it refers only to the notary, and the certificate of a notary is not received as

evidence of the facts certified. I hesitated at one time whether by analogy to the cases of the chirograph of a fine, and the enrolment of deeds, we might not also, in order to avoid the expense of examined copies, consider these as made by the officer, who is in the habit of *delivering out copies of judgments, and which are received as evidence in the courts in Jamaica ; but, upon farther reflection, I think the analogy does not hold ;
 . for supposing it had appeared, which it does not, that the officer was of the description above mentioned, still, in the case of a fine, the chirograph is delivered out as part of the title of the person applying, by an officer specially entrusted for that purpose. But we do not allow to our own officers, who have the mere custody of the records, to verify them, and I do not see why we should allow more to the officers of a foreign Court.

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 BRAYBROOK.

[*38]

HOLROYD, J. :

The distinction is plain between that which proceeds from the officer in the course of his duty in the office, and that which he is not specially authorized by his office to do. Thus, it is part of the duty of the steward of a manor to deliver to the tenants, as part of their title, copies of the Court rolls ; copies, therefore, are admitted in evidence upon the same principle as the chirograph of a fine, and enrolment of a deed. In Bull. N. P.,† it is laid down, “that office copies of depositions are evidence in Chancery, but not at common law without examination with the roll.” If such be the rule in regard to one of the superior Courts in this country, how can it be that the present evidence is admissible? If a copy of a judgment made by our officers here would have been rejected, how can we admit these, as being made by the officer of a foreign Court? An exemplification is under the seal of the Court, which shews it to be the act of the Court, and it is equivalent, when the act is done *by an officer who has a duty cast on him for the express purpose : it is equivalent to an exemplification. Here the copies are neither under the seal of the Court, nor do they proceed from a person specially entrusted to deliver them. I think, therefore, the evidence was inadmissible.

[*39]

† P. 229.

1817.
Jan. 23.

GARNETT v. WOODCOCK.†

(6 M. & S. 44—45.)

[44]

A presentment of a bill of exchange at the banking-house where payable, after banking-hours, is sufficient if a person be stationed at the banking-house and return for answer no orders.

[*45]

THE plaintiff declared, as the indorsee of a bill of exchange accepted payable at Denison & Co., London, and averred a presentment at Denison's for payment, and at the trial before Lord ELLENBOROUGH, Ch. J., at the London sittings after last Term, in order to make good the averment, proved that the notary's clerk called with the bill at the banking house between the hours of six and seven in the afternoon; that the clerks *were gone, but a servant was stationed there, who, on the bill being presented, returned for answer that there were no orders. There was a verdict for the plaintiff.

And now *Campbell* moved to set it aside, on the ground that this being a presentment out of banking hours was irregular, and therefore insufficient; and he cited *Parker v. Gordon*.‡

But *per CURIAM*:

Here, though the presentment was out of banking hours, there was a person stationed for the purpose of returning an answer, and an answer was returned, the same as would have been if the presentment had been within the hours of business. The answer was not that the party came too late, but that there were no orders; the object of the presentment was therefore completed, after which it cannot be open to either party to aver that it was out of time.

Rule refused.

† Qu. whether this case applies under the Bills of Exchange Act, 1832, s. 45 (3).—R. C. ‡ 8 R. R. 646 (7 East, 385). See also *Elford v. Teed*, 1 M. & S. 28.

DOIDGE *v.* CARPENTER AND OTHERS.

(6 M. & S. 47—49.)

1817.
Jan. 24.

[47]

In case for disturbance of common of pasture, plaintiff declared in respect of a messuage and lands for common for all his cattle levant and couchant: Held, that a lease to plaintiff's testator for years, determinable on lives of a farm, &c., together with reasonable common of pasture was sufficient to sustain the right of common alleged in the declaration; and that this right was not destroyed by a subsequent conveyance to the plaintiff in fee of the farm and common of pasture thereto belonging and appertaining; for this operated as a new grant of the common.

CASE for disturbing the plaintiff in his right of common. The plaintiff declared that he was possessed of a messuage and divers, (to wit,) 100 acres of land with the appurtenances, by reason whereof he ought to have had, and still of right ought to have, common of pasture for all his commonable cattle levant and couchant in and upon the said messuage, &c. on a certain waste, one part called Territon, and the other Tewell Down, &c., every year and at all times of the year, belonging and appertaining to the said messuage, &c. Plea, not guilty. At the trial before PARK, J. at the last Devon Assizes, the plaintiff, who claimed as executor, put in a lease dated the 6th January, 1755, and made to his testator for years determinable on three lives, of a farm called Woodley Farm, &c. together with reasonable common of pasture for the said farm and premises in and upon the said Downs, &c. Upon this evidence it was objected that there was a variance; the *lease being for reasonable common of pasture, and the declaration, for all his cattle levant and couchant. The cause, however, was suffered to proceed, and a conveyance was put in and proved on the part of the defendant, dated 30th September, 1803, whereby the said farm, common and commons of pasture, &c. thereunto belonging, or in any wise appertaining, were conveyed to the plaintiff in fee. The case went ultimately to the jury upon the evidence, the question being, whether the lord had approved leaving a sufficiency of common; and there was a verdict for the plaintiff, damages 1s.

[*48:]

In the last term a rule *nisi* was obtained for a new trial upon the objection taken as above stated, and also upon the ground,

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v.
CARPENTER. that by the conveyance in fee to the plaintiff, the term, and with it the right of common, were merged.

Pell, Serjt. and *Bayly*, who shewed cause, argued as to the first objection, that a grant of reasonable common of pasture was *ex vi termini*, a grant of common for all cattle levant and couchant, for reasonable common was defined by levancy and couchancy; secondly, as to the merger, that by the very express terms of the conveyance in fee the common was kept alive, being expressly granted to the plaintiff.

[*49]

Lens, Serjt. and *Gifford*, *contrà*, denied that reasonable common meant *ex necessitate* common for all cattle levant and couchant; it might mean reasonable as to the extent of the tenant's enjoyment, with reference to the lord's right to approve. And upon the other point they said, that the common did not pass by the conveyance in fee, because it was appurtenant to the term, and therefore merged with it. So, if the lord grant the *freehold of a copyhold to which common belongs, with all profits and common appurtenant, the grantee shall not have common, for it was appurtenant to the customary estate, not to the freehold.† Admitting, however, that it did pass, yet it could only pass as a new grant, and not as appurtenant,‡ for which alone the plaintiff has declared.

LORD ELLENBOROUGH, Ch. J.:

"Thereunto belonging or in any wise appertaining," which are the words of the conveyance in fee, seem as if they were studiously selected in order to constitute a grant *de novo*, to subsist in enjoyment as before. On the other point, common of pasture limited by levancy and couchancy is the usual common, and reasonable may well import what is usual.

BAYLEY, J.:

It should seem from the case in *Bos. & P.*, that a right will pass by a particular description, as an easement newly created, which is this case.

Per CURIAM : §

Rule discharged.

† Com. Dig. Copyh. K. 6.

§ Holroyd, J. left the Court during the argument.

‡ *Whalley v. Thompson*, 4 R. R. 826 (1 Bos. & P. 371).

ROBERT JOHNSON AND WILLIAM ELLIS, BOND CREDITORS, AND WILLIAM HOLIDAY AND T. NICHOLSON, CREDITORS BY SIMPLE CONTRACT, OF SIR JOHN LEGARD, BART., DECEASED, ON BEHALF OF THEMSELVES AND ALL OTHER CREDITORS, *v.* SIR THOMAS LEGARD, BART., THOMAS DIGBY LEGARD, AN INFANT, THE ELDEST SON OF SAME, WILLIAM LEGARD, CLERK, DIGBY LEGARD, RICHARD WATT, AND RALPH CREYKE, ESQUIRES.

1817.
Jan. 31.
[60]

(6 M. & S. 60—67; S. C. 3 Madd. 28—30; and sequel in Turn. & Russ. 281.)

J. L., in consideration of marriage and a marriage portion, settled his estate by lease and release to the use of himself for life, then to trustees to preserve contingent remainders; remainder to the use that the wife should receive a rent charge thereout for life for her jointure; remainder to the use of the first and other sons of the marriage in tail male; remainder to the use of the first and other sons of settlor by any future wife in tail male; remainder to the use of settlor's brothers respectively for life, and to their first and other sons respectively in tail male: Held, that none of the limitations to the brothers of the settlor were good as against a subsequent purchaser with notice.†

THIS was a case from the Court of Chancery.

Sir John Legard being seised in fee previously to and in contemplation of his marriage with Catharine Lapel Aston, by indentures of lease and release dated respectively the 14th and 15th of June, 1782, the lease being between himself, of the one part, and Thomas Grinston and Edward Dicconson, of the other part; and the release being between himself, of the first part, Henry Aston and the said C. L. Aston, of the second part, the said T. G. and E. D., of the third part, Thomas Eccleston and Edward Standish, of the fourth part, and H. H. Aston and Anthony Hodges, of the fifth part; reciting the intended marriage, and that upon the solemnization thereof, and by virtue of a certain indenture tripartite, bearing equal date with the

† Followed by *MALINS, V.-C.* in *Smith v. Cherrill* (1867) L. R. 4 Eq. 390, 36 L. J. Ch. 738, and by *HALL, V.-C.* in *Price v. Jenkins* (1876) 4 Ch. D. 483 (reversed on other grounds, 5 Ch. Div. 619, 46 L. J. Ch. 805). See this last explained by *FRY, J.* in *Gale v. Gale* (1877) 6 Ch. D. 144, 152, 46 L. J. Ch. 809. See now 56 & 57 Vict. c. 21.—R. C.

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[*61]

said release, between the said H. Aston, of the first part, the said C. L. Aston, of the second part, and the said Sir J. Legard, *of the third part, the said C. L. Aston would become entitled to a fortune or portion of 4,000*l.*, chargeable upon divers manors, lands, and hereditaments therein mentioned; and that the said Sir J. Legard was seised in fee of the premises thereby released, situate in the county of York, subject to an annuity or rent-charge of 500*l.* unto his mother, for life, for her jointure, and also to the sum of 6,000*l.* for the portion of his brothers and sisters; and that he was also seised in fee of three undivided fourth parts of the premises thereby released, situate in the county of Northumberland, subject to a mortgage thereon for securing 2,000*l.* and interest; and that upon the treaty for the said intended marriage it had been agreed that the said Sir J. Legard should receive the sum of 4,000*l.*, being the fortune to which the said C. L. Aston would become entitled as aforesaid; and that he should thereout discharge the said mortgage and interest; the said Sir J. Legard, in consideration of the said intended marriage, and of the said marriage-portion which it was agreed should be paid to him as aforesaid, and for the settling a jointure for the said C. L. Aston, and for making a provision for the issue of the said marriage, and for settling and assuring the said premises, to the several uses, and to the several intents and purposes, and subject to the several powers, provisoes, limitations, and agreements thereafter declared; and also in consideration of the sum of 10*s.* by the said T. G. and E. D. to him paid, granted, bargained, sold, and released unto the said T. G. and E. D., their heirs and assigns, (among other things,) the said premises situate in the county of York, to hold to them, their heirs and assigns, to the use of himself, his heirs and assigns, until the marriage and afterwards, to the use of himself and his *assigns during his life, without impeachment of waste; remainder to the use of the said T. G. and E. D. and their heirs, to preserve contingent remainders; remainder to the use that the said C. L. Aston and her assigns, in case she should survive him, should during her life receive thereout the rent-charge therein mentioned as her jointure, and in bar of dower, with the usual powers of distress and entry for recovering

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the same; remainder to the use of the said T. Eccleston and E. Standish, their executors, administrators, and assigns, for the term of one hundred years, determinable upon the death of the said C. L. Aston, in trust for securing the payment of the last-mentioned rent-charge; remainder to the use of the said H. H. Aston and A. Hodges, their executors, administrators, and assigns, for the term of five hundred years, upon trust for raising certain portions for the daughters and younger sons of the said marriage; remainder to the use of the first and other sons of the said marriage successively in tail male; remainder to the use of the first and other sons of the said Sir J. Legard by any future wife successively in tail male; remainder to the use of T. Legard, (now the defendant Sir Thomas Legard), his brother, during his life, without impeachment of waste; remainder to the use of the said T. G. and E. D., in trust to preserve contingent remainders; remainder to the use of the first and other sons of the said T. Legard successively in tail male, with like remainders respectively to the use of the defendants W. and D. and R. Legard, other brothers of the settlor, and their first and other sons successively; remainder to the use of the settlor in fee. The marriage took effect shortly afterwards. By indentures of lease and release of the *12th and 13th of October, 1807, the said Sir J. Legard, for a valuable consideration, conveyed to the defendant R. Watt, his heirs and assigns, a part of the premises comprised in the said indentures of settlement. The said R. Watt at the time of making this conveyance, and before he paid his purchase-money, had notice of the said settlement. Sir J. Legard died without having had any issue. The question for the opinion of the Court was, whether the limitations contained in the said settlement which are subsequent to the limitations to the use of the first and other sons of the said Sir J. Legard by any future wife in tail male, or any of such limitations, are good and valid limitations as against the said R. Watt.

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This case was argued by *Gifford* for the plaintiffs, and by *Sudgen* for the defendants. For the plaintiffs it was said, that the limitations subsequent to those to the use of the first and

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other sons of the settlor by any future wife, were without any valuable consideration, and so were voluntary and fraudulent within the stat. 27 Eliz. c. 4,† and therefore void as against the defendant Watt. That however hard the doctrine might bear upon family settlements, it was now established beyond controversy, that a fraudulent conveyance within the stat. 27 Eliz. is void against a subsequent purchaser for valuable consideration, notwithstanding he hath notice; and that a voluntary conveyance without valuable consideration, however reasonable its provisions may be, is fraudulent within that statute. That in support of these positions many authorities might be quoted.‡

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That *it was also clear, that a deed might contain some limitations which were valid, being for good consideration, and others which were void for want of it; § and in like manner, upon a covenant to stand seised to uses, some have been maintained, as being founded on natural love and affection, while others were rejected.¶ It remained then to be enquired, what was the consideration in the present case; and the answer was, the intermarriage of the settlor (the absolute owner of the estate,) and his intended wife (who brought the portion). To such a consideration it was obvious, that the collateral kindred of the settlor must be entire strangers, for it could never be intended that the marriage served as an inducement to the estate of the brothers; so that the whole being put together, it was nothing more as to them than the good will and natural love which the settlor bore to them; and was merely voluntary and void as against a subsequent purchaser.¶ And this consideration could no more extend to collateral kindred under the present settlement, than it would have done, if the settlor had limited the uses to the

† See now 56 & 57 Vict. c. 21.

‡ 5 Co. Rep. 60 b. *Gooch's case*; *Doe v. Manning*, 9 R. R. 503 (9 East, 59), per Lord ELLENBOROUGH, Ch. J.; *Pulvertoft v. Pulvertoft*, 11 R. R. 151 (18 Ves. 84, 90), per Lord ELDON; *Hill v. Bishop of Exeter*, 11 R. R. 527 (2 Taunt. 69, 82), per MANSFIELD, Ch. J.

§ Styles, 428, per ROLLE, Ch. J.; 1 Chan. Cas. 243, *Bellingham v. Lowther*, S. P. admitted.

¶ Plowd. 307 b; 1 Co. Rep. 154 a; 2 Roll. Abr. 784, tit. Uses, pl. 5, 8; Moore, 194.

¶ Lane, 22, case of *St. Saviour's*, *Southwark*, ad finem; *Reeves v. Reeves*, 9 Mod. 132, per Lord MACCLESFIELD; *Staplehill v. Buller*, Preced. in Chose, 224; *Osgood v. Strode*, 2 P. Wms. 245; *Roe v. Mitton*, 2 Wils. 356; and see the next case, *Clayton v. Earl of Wilton*, p. 307 post.

issue of the marriage, and afterwards, by another deed, had settled the reversion on his brothers; in which case the second settlement would clearly have been voluntary and void in a case like the present.

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On the other side, it was not disputed that a voluntary conveyance within the meaning of the 27 Eliz. was void, as it regards a purchaser for valuable consideration with or without notice. But it was urged, that considering the highly penal consequences to the parties and privies to such a conveyance, affecting not only their property, but also their liberty; † it was, at least, a fit matter for serious discussion, how far the limitations in question could be pronounced voluntary within the meaning of the statute. Now it was observable, that the statute ‡ speaks not of voluntary, but only of “fraudulent, fained, and covenous conveyances made for the intent to defraud and deceive purchasers;” and it contains an express reservation of “limitations of an use for good consideration and *bonâ fide*;” so that, if the matter were *res integra*, it might well excite surprise how the word “voluntary” comes to be introduced in place of the clear language of the Act. That the marriage and marriage portion were an adequate consideration, for many of the limitations in this settlement could not be denied; but it was said, they were only so for such of the limitations as might be supposed to flow immediately from the marriage contract. But how comes it, then, that the limitation to the issue of a second wife should be good; and that Lord HALE should have been of opinion, in a case similar to the case at Bar, “that the consideration of the marriage and the marriage portion will run through all the estates raised by the settlement, though the marriage be not concerned in them, so as to make them good against purchasers, and to avoid a voluntary conveyance;” and that the Lord Keeper *Bridgman also was of the same opinion? § Again, it has been said from high authority, that if a father upon the marriage of his eldest son, in a settlement upon him, make

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† See sect. 3.

‡ See sect. 4.

§ *Jenkins v. Keymis*, 1 Lev. 150, 237; S. C. 1 Chan. Cas. 105; Hardr.

395; see also *Le Seignior Tenham's* case, 2 Lev. 105; *Clayton v. Earl Wilton*, p. 307, *post*.

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remainders to younger brothers after the consideration of the marriage, those remainders are good within the meaning of the statute, against any claim of creditors.† And it seems that equity, which never interferes in the case of a mere volunteer, will enforce the execution of a covenant in marriage articles in favour of the husband's brothers ; or sisters,§ or of the wife's issue by a former marriage ; || for it was declared, " that such a settlement was no voluntary agreement, and that the statutes of the 18 & 27 Eliz. that make conveyances fraudulent, are voluntary conveyances, made against purchasers upon a valuable consideration, or *bonâ fide* creditors."¶ And a similar doctrine to the above will be found in other cases.†† As to what had been said, that the marriage could be no inducement for the remainders to the brothers of the settlor, it might be asked, was it not reasonable that the wife should desire to have the collateral branches of her husband's family, in the event of his dying without issue, maintained in affluence, in order to secure to herself the due payment of her jointure ? Or, as the brothers were themselves incumbrancers to the amount of their respective portions, *was not this a substantial motive with the wife, for contracting that the limitations should be to them who might otherwise disturb the estate ? And if there were any motive, that is sufficient, because the Court cannot weigh whether it be of greater or less degree.

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At the conclusion of the argument the Court said, they would consider the case and certify their opinion.

Afterwards the following certificate was sent :

" We have heard this case argued by counsel and have considered it, and are of opinion, that none of the limitations contained in the said settlement, made on the marriage of the said Sir John Legard with the said Catherine Lapel Aston his wife, which are subsequent to the limitations therein contained, to the

† *Per* Lord MANSFIELD, *Doe v. Roulledge*, Cowp. 710—711.

‡ *Vernon v. Vernon*, 2 P. Wms. 594.

§ *Goring v. Nash*, 3 Atk. 186.

|| *Newstead v. Searles*, 1 Atk. 265 [since reported 9 App. Ca. 320 n.].

¶ *Ibid.*

†† *Fairfield v. Birch*, Sugden on Vendors, 626 ; Appendix No. 23, 6th edit. ; *Brown v. Carter*, 5 R. R. 191 (5 Ves. 862) ; *Nairn v. Prowse*, 6 R. R. 37 (6 Ves. 752, 758).

use of the first and other sons of the said Sir John Legard by any future wife in tail male, is a good and valid limitation as against the said Richard Watt, claiming to be entitled under and by virtue of such conveyance to him as aforesaid.

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“ELLENBOROUGH.

“J. BAYLEY.

“C. ABBOTT.

“G. S. HOLROYD.”

THOMAS CLAYTON, Esq. v. THE EARL OF
WILTON AND OTHERS.†

1817.

CASE FROM THE COURT OF CHANCERY.

(6 M. & S. 67—69, n.†)

A limitation in a marriage settlement, in favour of the issue of a second marriage by the settlor, was held good against a subsequent purchaser for valuable consideration.

THE plaintiff being seised in fee, previously to, and in contemplation of his marriage with Susan Nuttall, by indentures of lease and release of the 28th and 29th of November, 1788, between the plaintiff of the first part, the said Susan Nuttall of the second part, Earl Grey de Wilton and Charles Townley of the third part, and Randall Andrews and Thomas Whitehead of the fourth part, reciting that the said S. Nuttall was possessed of and entitled to a portion or fortune, consisting of several sums of money placed out at interest upon mortgage in her own name, and in the name of the executors of her late father, *during her minority, whereupon there was due for principal and interest the sum of 7,000*l.* and upwards; reciting also the intended marriage, and that upon the treaty thereof, it had been agreed that, in case the marriage took effect, the said portion or fortune should be paid and applied towards discharging certain sums of 10,073*l.*, which were good charges in equity upon the said estates of the plaintiff; and that the said hereditaments should be settled upon such trusts, and subject to such powers, provisoes, &c. as thereafter expressed, he, the plaintiff, in con-

[68, n.]

† Followed by *FRY, J.* in *Gale v. Mestre v. West*, '91, A. C. 264, 268—*Gale* (1877) 6 Ch. D. 144, 46 L. J. Ch. 270, 60 L. J. P. C. 66 (J. C.).—R. C. 809; and see *In re Cameron and Wells* † S. C. 3 Madd. 302, *n.*, p. 234 (KAY, J. 1887) 37 Ch. D. 32; *De* above.

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sideration of the intended marriage, and of the said portion or fortune being paid and applied as before mentioned, and for making a competent jointure for the said Susan Nuttall, in case the marriage should take effect, and she should survive him, and also a provision of portions and maintenance for the issue of the marriage, and for settling and assuring the said hereditaments upon such trusts, and subject to such powers, provisoes, &c. as thereafter mentioned; and in consideration of the sum of 10*s.* by the said Lord Grey, C. Townley, R. Andrews, and T. Whitehead to the plaintiff paid, the receipt whereof was thereby acknowledged, released and conveyed the said hereditaments unto the said Lord Grey, C. Townley, R. Andrews, and T. Whitehead, and their heirs, to the use of the plaintiff and his heirs till the marriage, and afterwards to the use of him and his assigns for life, without impeachment of waste; remainder to the use of the said Lord Grey and the three other trustees in trust, to preserve contingent remainders; remainder to the said Susan Nuttall and her assigns, to receive a certain rent charge thereout for her jointure, and in bar of dower; remainder to the use of the first and other sons of the plaintiff on the body of the said Susan Nuttall to be begotten, and the heirs male of their bodies severally and successively in tail male; remainder to the use of the first son of the plaintiff on the body of any woman or women he might happen to marry after the decease of the said Susan Nuttall, to be begotten, and the heirs male of the body of such first son lawfully issuing remainder to the use of the second, third, fourth, and all and every other son and sons of the plaintiff on the body of any such woman or women, and the heirs male of his and their bodies; remainder to the use of all and every the daughters of the plaintiff on the body of the said Susan Nuttall to be begotten, equally to be divided between them as tenants in common, and of the heirs of the body and bodies of such daughter and daughters, with cross remainders to the daughters; and in case all but one should die without issue, or if there should be but one such daughter, then to the use of such one surviving or only daughter and the heirs of her body; remainder to the use of the plaintiff and his heirs for ever.

The marriage took effect, and the said Susan Nuttall died without issue; after whose death the plaintiff, before he married again, by indenture of lease and release of the 17th and 18th of June, 1794, conveyed a part of the said hereditaments to Lady Mary Stanley and her heirs, for a full and valuable consideration paid by her to the plaintiff.

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WILTON.

And the question was, whether this conveyance was a good and valid conveyance against the issue of the plaintiff's second marriage.

[69, n.]

This question was argued at Serjeants' Inn on Tuesday, the 27th April, 1813, at the sittings before Easter Term, by *Scarlett* for the plaintiff, and *Holroyd* for the defendant; the point in debate being, whether the settlement, as it regarded the children of a future marriage, was to be deemed voluntary, and as such, void against a subsequent *bonâ fide* purchaser for valuable consideration. As to which, the principal authorities which have been quoted in *Johnson v. Legard* (p. 301, *ante*) were referred to. And the Court afterwards sent the following certificate:

“This case has been argued before us by counsel. We have considered it, and are of opinion that the conveyance by the plaintiff to Lady Mary Stanley is not a good and valid conveyance against the issue of the plaintiff's second marriage.

“ELLENBOROUGH,
“N. GROSE,
“S. LE BLANC,
“J. BAYLEY.”

1817.
Feb. 1.

GARD v. CALLARD.

(6 M. & S. 69—72.)

[69]

A toll of reasonable amount may be claimed by custom.† In an action on the case upon a custom for not grinding at plaintiff's mills, plaintiff may declare generally upon the custom for a certain toll, without specifying the particular toll, or the consideration for it, or that it is a reasonable toll; and a continuance of uniform payment and acquiescence is evidence of its reasonableness, and the Court shall judge under all the circumstances what is reasonable.

In an action upon the case, the plaintiff declared upon a custom that all the inhabitants within the borough of Modbury brewing in their houses there any ale or beer for sale, ought to grind at his mills in the parish of Modbury, all the malt used or spent ground by them in their said houses, in the brewing of ale or beer for sale, and to pay him a certain toll for the grinding thereof; and alleged that the defendant was an inhabitant, &c. and that on the 1st January, 1803, and on divers other days between that and the day of exhibiting the bill, he ground at other mills. And upon not guilty pleaded, the case was tried before PARK, J. at the last Devon Assizes, when it was proved by several witnesses, old inhabitants of the borough, some of whom had rented the mills under the lord of the manor before the plaintiff, *that all the inhabitants selling beer within the borough had been used to grind their malt at these mills, except on pressing occasions, when they obtained leave from the miller to use hand-mills; that a toll of six quarts and a pint out of every bag of twenty gallons was paid for the grinding; and that a toll-dish of that measure was used to be kept at the mills for the purpose. Some of the witnesses upon cross-examination stated, that the lord of the manor used to find bags for the malt. Whereupon it was objected, that the finding of bags was a part of the custom, and so the custom was not proved as laid, but this point being left to the jury, they found the custom as laid. Secondly, it was objected that the custom was unreasonable and void, because the toll was excessive, being nearly one-twelfth; as

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† Cited and applied in judgments *rence v. Hitch* (Ex. Ch. 1868) L. R. of the Court in *Mills v. Mayor, &c.* 3 Q. B. 521, 531, 37 L. J. Q. B. 209. of *Colchester* (1867) L. R. 2 C. P. 476, —R. C. 485, 36 L. J. C. P. 210; and in *Law-*

to which the learned Judge held, that the question, whether reasonable or not, was a question for the Court and not for the jury; and a verdict having passed for the plaintiffs,

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Gaselee in the last Term renewed these objections upon a motion for a new trial; and as to the latter he said, that although in many instances it might be for the Court to determine as to what should be deemed reasonable; yet, in the particular objected to, it was otherwise, because the proportion of toll which was reasonable to be taken depended on a variety of circumstances, and could not be judged of in the abstract, and therefore, the present was a question for the jury alone; and he instanced a case tried at Exon, where the toll taken was but one twenty-fourth of a bag, yet even there, the custom was sustained with difficulty, by reason of the magnitude of the toll. He also took another objection, *viz. that the plaintiff has declared for a certain toll generally, without shewing what toll, or the consideration for it, and without alleging that it was a reasonable toll; and he cited *Harlin v. Green*.†

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Pell, Serjt. and *Gifford*, who shewed cause, cited *Drake v. Wigglesworth*‡ and *Coryton v. Lithebye*§ in support of the custom, and also of the manner of declaring generally for toll without more, as to which they likewise quoted several precedents from the entries: || and in *Chapman v. Flexman*,¶ it was held sufficient to say in this possessory action, “that he had and ought to have the toll.” And they said that usage was evidence of its being reasonable, because the particular reason for it may, from length of time, be difficult to assign;†† *non constat*, that the lord originally might not have been put to great expense or inconvenience, so as to lay an adequate consideration for the *quantum* of toll; and if it might have had a lawful origin, it shall be presumed after such a lapse of time that it had. And in every

† Moor, 887; Hob. 189.

‡ Willes, 654.

§ 2 Saund. 112.

|| *Rastall*, action sur case pur nusans

α *Molyn*; Herne's Plead. 83, 84;

Fitz. N. B. Writ of Tresp. G.

¶ 2 Ventr. 292; Fitz. N. B. 123, for an ancient watercourse, *currere consuevit*.

†† 1 Inst. 62; 1 Bl. Com. 77.

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case the question, whether reasonable or not, must in some degree depend on the facts, yet this does not preclude the Court from judging of that question, as reasonableness of time, notice, &c. In *Coryton v. Lithebye*, the toll was greater than the present, being one gallon in every bushel,† yet no objection was there taken to the *quantum*.

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Gaselee and *Bayly*, in support of the rule, maintained, that although it might be enough to declare generally as to the custom, yet the alleging a consideration was indispensable; and in this all the precedents agreed. And they took this difference, that where the question was whether the toll was reasonable in its kind, there it might rest with the Court to decide; but where the question was only as to its *quantum*, the jury ought to determine it under all the circumstances; and this could not depend on usage alone, for then, however disproportionate, it might be good. And they said that it was remarkable that in all the precedents in which judgment appears to have passed for the plaintiff, it is averred that the toll was a reasonable toll, as in *Drake v. Wiggleworth*, *Cort v. Birkbeck*;‡ and in *Coryton v. Lithebye* where it was not so averred, judgment was given for the defendant.

But the Court discharged the rule, being of opinion, upon the authorities quoted, that the plaintiff had well declared for the toll; and as to the reasonableness of it, they said, that doubtless long usage and acquiescence in one uniform payment was cogent evidence that it was reasonable; and they quoted 2 Inst. p. 222, that “what shall be deemed in law to be reasonable, shall be judged, all circumstances considered, by the Judges of the law, if it come judicially before them.”

† The words “gallon” and “bushel” report.—F. P.
are erroneously transposed in the ‡ 1 Dougl. 218.

G. WOLFF AND OTHERS, ASSIGNEES OF J. WOLFF
AND J. DORVILLE, BANKRUPTS, *v.* OXHOLM.†

(6 M. & S. 92—106.)

1817.
Feb. 6.

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An ordinance made by the government of Denmark pending hostilities with Great Britain, whereby all ships, goods, money and money's worth, of or belonging to English subjects, were declared to be sequestered and detained; and all persons were commanded, within three days, to transmit an account of debts due to English subjects, in default of which they were to be proceeded against in the Exchequer—in consequence of which, a suit then depending in the Danish court for recovering a debt due from a Danish to a British subject was not further prosecuted, and the debt was afterwards paid by the Danish subject, at the rate specified by the ordinance, to commissioners appointed in virtue of the ordinance to receive payment, upon production of whose receipt the Danish court quashed the suit:

Held, no answer to an action against the Danish subject to recover the same debt in the Courts of this country: for the ordinance, not being conformable to the usage of nations, was void.

ASSUMPSIT for money lent by the bankrupts, money paid, and money had and received. Plea, *non assumpsit*. At the trial before Lord Ellenborough, Ch. J. at the London sittings after Hilary Term, 1816, there was a verdict for the plaintiffs for 4,106*l.* 10*s.* 6*d.*, subject to the opinion of the Court on the following case.

The plaintiff, G. Wolff, is a native and subject of the King of Denmark, but many years ago was naturalized in this country by Act of Parliament, and has resided here ever since. He and the bankrupts (who are British subjects) carried on trade here in partnership, under the firm of Wolffs and Dorville. On the 7th of February, 1800, the defendant, who is a Danish born subject resident in Denmark, was indebted to the partnership in the sum of 2,101*l.* 7*s.* 5*d.* sterling for monies paid and advanced by them for the defendant in this country, and bearing interest at 5 per cent. For the recovery of this sum Wolffs and Dorville directed their proctor at Copenhagen to institute proceedings against the defendant, and accordingly a suit was instituted in the proper court at Copenhagen. In answer to this

† Referred to, with the observation that such cases are exceptional, in the judgment of the Court delivered

by WILLES, J. in *Phillips v. Eyre* (1870) L. R. 6 Q. B. 1, 27; 40 L. J. Q. B. 28.—R. C.

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suit the defendant set up some unliquidated claims of himself and *one Frederick Hage, against Wolffs and Dorville, who were thereupon advised by their proctor to assign the debt and interest to some friend in this country, in order that the same might be sued for and recovered in the Danish Courts in his name, by which means they would remove the difficulty arising from the counter-claim of the defendant and Hage, but the defendant never had any notice of such advice. Conformably thereto, an indenture, under the hands and seals of the partners, dated 28th January, 1806, was executed in London, whereby, for the consideration of 2,500*l.* therein expressed to have been paid to them by Wm. Mountford of Whitechapel, they assigned the debt and interest, then amounting together to 2,861*l.* 14*s.*, to Mountford, with power to him and his substitute to demand, sue for, and recover the debt, and to give discharges for the same. By the laws of Denmark, an assignment of a debt vests the legal right in the assignee to recover the debt in his own name, as his own property, as well as the beneficial interest in the debt. Immediately after the execution of the assignment, Mountford signed and delivered to Wolffs and Dorville a memorandum, bearing even date, whereby it was declared that the assignment was made to him only as a trustee for Wolffs and Dorville, but the defendant never had any notice of such declaration of trust, or that the consideration money for the said assignment was not really and *bonâ fide* paid. Mountford also, at the request of Wolffs and Dorville, at the same time executed a letter of attorney of the same date, whereby he appointed their proctor to be his attorney, to demand, sue for, and recover the debt, and to give discharges for the same. This assignment and letter of attorney were shortly afterwards transmitted by *Wolffs and Dorville to their proctor at Copenhagen, with directions to commence legal proceedings against the defendant for the recovery of the debt. In pursuance of these directions the proctor commenced a suit in the royal superior Justiciary Court there, against the defendant, at the suit of Mountford, but the defendant never had any notice of the assignment and letter of attorney having been transmitted by Wolffs and Dorville, or of their having given any directions to the proctor relative thereto.

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v.
OXHOLM.

In September, 1806, the defendant instituted a cross suit in the Court against Mountford, to which Wolffs and Dorville were made parties, and were served with a citation to appear, and accordingly executed a proxy to enter an appearance. In 1807, whilst these suits were depending, a war between Great Britain and Denmark commenced, and a law or ordinance was thereupon made by the Government of Denmark, dated 16th August, 1807, by which all ships, goods, money, and monies worth, of or belonging to English subjects, were declared to be sequestrated and detained; and by another law or ordinance of the Government of Denmark, dated 9th September, 1807, all persons were commanded within three days after the publication thereof (wherever it was not then already done) to transmit an account of the debts due to English subjects, of whatsoever nature or quality they might be, the whole of which were directed to be paid into the Danish treasury, and in case of concealment the person so offending was to be proceeded against by the officers of the exchequer. In virtue of this law and ordinance, commissioners were appointed to receive the debts declared to be sequestrated; and as a consequence of the ordinance, the suit of Mountford against the defendant was not farther prosecuted, and *in 1807 the proctor gave information to the commissioners of the debt. The commissioners appointed in virtue of the ordinance of 9th September, were authorised and directed to receive payment of the debts due to British subjects from Danish debtors, at the rate of six Danish dollars to the pound sterling, being the then current rate of exchange. The defendant at the date of this ordinance, was resident and domiciled in Copenhagen, and so continued till 1814; and on the 27th November, 1812, in obedience to the said ordinance, but without the knowledge or consent of Wolffs and Dorville or of Mountford, he *bonâ fide* paid to the commissioners in Danish dollars, at the rate specified, the debt of 2,861*l.* 14*s.* assigned to Mountford, and a further sum of 1,244*l.* 16*s.* 6*d.* for interest to that time, and took their receipt for the same; upon the production of which the Court quashed the cause depending between Mountford and the defendant. At the time of this payment the rate of exchange was from forty-five to fifty dollars to the pound sterling. A com-

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OXFOLM.

mission of bankruptcy was on the 2nd November, 1812, issued against J. Wolff and J. Dorville, under which they were duly declared bankrupts, and the plaintiffs Norman, Martin, and Meyer were chosen assignees. In 1814 the defendant arrived in this country and was arrested, and held to bail by the plaintiffs for the debt.

The question for the opinion of the Court was, whether the plaintiffs were entitled to recover.

This case was argued at Serjeants' Inn before Michaelmas Term last, by *Carr* for the plaintiffs, and *Gifford* for the defendant.

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For the plaintiffs three points were made; first, which was the principal point, that the Danish confiscatory ordinance was void, being contrary to the acknowledged practice and law of nations, and therefore affording no just ground of defence to this action; secondly, supposing the ordinance to be valid so as to cover and protect all acts done under it, yet the payment made by the defendant appeared from the facts stated not to have been a compulsory payment under the ordinance, but made by the defendant in order to avail himself of the advantage of the then existing state of exchange, which reduced the real value of the payment almost to nothing; thirdly, supposing the payment to have been made under the ordinance, yet as the defendant was a Danish subject, it must be considered as payment made to himself, because every subject of a State is to be deemed a party to the ordinances of his own Government. The following authorities were cited, viz. *Folliott v. Ogden*,† on the first point; and on the last Grot. lib. 2, c. 14, s. 1; ‡ Puffend. b. 2, c. 6, s. 10.; § Vattel, b. 1, c. 4, s. 40.; 1 Bl. Com. 53; *Touteng v. Hubbard*; || *Conway v. Gray*.¶

These positions were severally answered on the other side; as

† 2 R. B. 736 (1 H. Bl. 124).

‡ Hic quoque distinguendum censemus inter actus regis, qui regii sunt, et actus ejusdem privatos. Nam in regis actibus quæ rex facit, eo loco habenda sunt, quasi communitas faceret.

§ Civitas definitur quod sit per-

sona moralis composita, cujus voluntas ex plurium pactis implicite et unita pro voluntate omnium habetur.

|| 6 R. B. 791 (3 Bos. & P. 291).

¶ 10 East, 536 [overruled by *Aubert v. Gray* (1862) 3 B. & S. 169, 32 L. J. Q. B. 50].

to the second, it was denied that a payment such as this, which is stated to have been made in obedience *to the ordinance at the rate specified, and to the persons appointed by the ordinance to receive it, and to have been *bonâ fide*, could with propriety be called voluntary; and if not voluntary, but made in satisfaction of a suit then depending, under the compulsion of the ordinance, it must afford a defence to this action, unless the ordinance itself were of none effect. As to which it was urged that there was no difference, so far as it regards the right of confiscation, between debts and moveables, the latter of which were, by the constant practice between hostile States, subject to reprisals.† And stat. 34 Geo. III. c. 79,‡ was quoted as a confiscatory Act, somewhat of the same nature with this ordinance. In answer to *Folliott v. Ogden*, it was observed that it was a penal law and not an ordinance, like the present, of the hostile State which gave rise to that question; and it was decided upon the principle that the penal laws of one country cannot be taken notice of in another; § and afterwards this Court, in affirming that decision, did not adopt all the reasons of it, but took a different ground, viz. that the confiscatory act was not the act of an independent State. As to the third point, it was said that the doctrine laid down in *Conway v. Gray* was not applicable to a case like the present, and moreover, it had been much shaken by *Bazett v. Meyer*;|| but admitting *it, then had the plaintiff furnished an answer to this action; for he was a natural born Dane, and notwithstanding that he might also sustain the character of a British subject, the maxim was, *nemo potest exuere patriam*.

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Cur. adv. vult.

LORD ELLENBOROUGH, Ch. J. now delivered the judgment of the Court.

This case was very ably argued before us at Serjeants' Inn.

† Vatt. b. 2, c. 18, s. 344. *Ibid.* b. 3, c. 5, s. 73, 77. Grot. lib. 3, c. 8, s. 4. Ergo et incorporalia jura quæ universitatis fuerant, fiunt victoris quatenus velit. Sic Alba victa quæ Albanorum jura fuerant sibi vindicarunt Romani. Unde sequitur omnino liberatos Thessalos obligatione

centum talentorum, quam summam cum ipsi Thebanis deberent Alexander Magnus Thebarum dominus factus jure victoriæ ipsis donaverat.

‡ Repealed Stat. Law Rev. Act, 1871.

§ 2 R. B. 736 (3 T. B. 726, 733).

|| 5 Taunt. 824, 830.

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Upon the facts stated, it appears that the action was brought for the recovery of a debt contracted in England, by a Danish subject resident in Denmark, with a house of trade established here, and in a time of peace between the two countries. And although one of the partners in that house is a Dane, yet as his naturalization and residence in England entitle him to the benefit of the English laws, we think the case is the same in effect as if all the partners in the house had been natural born British subjects. It further appears, that with a view to deprive the defendant of some supposed claim of set off, which he was expected to make in the Danish Courts against the suit of the original creditors, they had assigned the debt to a third person in trust for themselves; and that their assignee commenced a suit in his own name in one of the Courts of Denmark against the defendant; who, in order to avoid the effect of this assignment, instituted a cross suit in the same Court against them and their assignee, to which they appeared; and in this state of things a war broke out between the two countries, and no further proceedings were had in either of the suits for several years, nor until they were quashed upon the application of the defendant on the production of the commissioners' *receipt mentioned in the case. One of the points insisted upon in the argument for the defendant was, that this assignment and the suit instituted upon it, were a bar to the plaintiffs' demand: but we think that they cannot have that effect. The assignee could not sue in the Courts of this country in his own name; the action must have been brought here in the names of the original creditors, even if they had assigned the debt for a valuable consideration; and although the assignment gave the assignee a right to sue in his own name in Denmark, yet the defendant does not appear to have been prejudiced by that measure even there, nor has any material consequence resulted therefrom. And we consider the case to stand now just as it would have done if no assignment had been made, and if the suit in Denmark had been brought by the plaintiffs themselves, instead of being instituted by their trustees. And this brings us to the consideration of what is the material question in the cause, viz. the legal effect of the Danish ordinance of confiscation promul-

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gated on the 16th of August, 1807, and the facts that took place after it, which constituted the main ground of the defence. If this ordinance is to be considered merely as a penal law, it is clear that the Courts of this country ought not to take notice of it, because no country regards the penal laws of another. *Folliott v. Ogden*, 1 H. Black. 135.† The penal laws of foreign countries are strictly local, and affect nothing more than they can reach and what can be seized by virtue of their authority: Lord LOUGHBOROUGH's judgment in *Folliott v. Ogden*. But, it was contended, that this ordinance was a proceeding founded upon and conformable to the law of nations, and that as the defendant paid the debt to the *persons appointed by the ordinance to receive the confiscated debts, he has a good discharge as to the debt itself according to the law of nations, to which the municipal Courts of this country, as well as of all others, ought to give effect. To prove that this ordinance was grounded upon and conformable to the law of nations, two passages were cited from Vattel's treatise, the first from book 2, chap. 18, sect. 344, where, speaking on the subject of reprisals, the author says, "Between state and state whatever is the property of the members is considered as belonging to the body, and is answerable for the debts of the body; whence it follows, that in reprisals they seize the goods of the subject, in the same manner as those of the state or the sovereign. Every thing that belongs to the nation is subject to reprisals wherever it can be found, provided it be not a deposit entrusted to the public faith." The other passage is in book 3, ch. 5. sect. 77. "Among the rights belonging to the enemy, are likewise incorporeal things, all his rights, titles, and debts, excepting, however, those kind of rights granted by a third person, and in which the grantor is so far concerned that it is not a matter of indifference to him in what hands they are vested. Such, for instance, are the rights of commerce. But as debts are not of this number, war gives us the same rights over any sums of money due by neutral nations to our enemy, as it can give over his other property. When Alexander by conquest became absolute master of Thebes, he remitted to the Thessalians a hundred talents which they owed to

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† 2 R. B. at p. 737.

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the Thebans. The sovereign has naturally the same right over what his subjects may owe to enemies. He may therefore confiscate debts of this nature, if the term of payment happen *in the time of war, or at least he may prohibit his subjects from paying while the war continues. To the proviso at the end of the first of these passages, the author himself immediately subjoins the following words: "As it is only in consequence of that confidence which the proprietor has placed in our good faith that we happen to have such deposit in our hands, it ought to be respected even in case of open war. Such is the conduct observed in France, England, and elsewhere, with respect to the money which foreigners have placed in the public funds." Now it is obvious that this reason will apply with equal force to a debt owing to an individual in the course of commerce; such individual trusted to the good faith of the individual with whom he dealt, and to the justice of the State of which that individual was a subject; and if it be contrary to good faith for a State to confiscate and convert to its own use debts owing by the State itself in its aggregate capacity, it cannot be less contrary to good faith to sequester and convert to the use of the State debts owing by its own subjects in their individual capacities. The concluding sentence of the second passage quoted by the defendant's counsel, and which was the main support of his argument, is expressed in such a manner as to shew that the author himself doubted of the right of confiscating debts due from individuals to individuals. He says, "at least the sovereign may prohibit his subjects from paying while the war continues." And, indeed, this is the actual limit of this right, viz. as it operates *in personam* upon the subject of the State, or upon his property, within the reach and control of such State. And in the very next sentence the author further qualifies his doctrine, and adds, "But, at present, a regard to the *advantage and safety of commerce has induced all the sovereigns of Europe to act with less rigour in this point. And as this custom has been generally received, he who should act contrary to it would violate the public faith; for strangers trusted his subjects only from a firm persuasion that the general custom would be observed." We have not, however, been able to discover that there ever was a time when greater

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rigour generally prevailed on this subject, as Vattel appears to have supposed. Some instances, indeed, of similar confiscations in the sixteenth and seventeenth centuries are mentioned by Bynkershook in his *Questiones Juris Publici et Privati*, c. 7, and appear to be considered by that writer as warranted by the law of nations, and available to the debtor where payment has been actually enforced from him by the authority of his own Government. And there was a decision about the middle of the sixteenth century by a court at Paris in favour of a Frenchman, against the claim of a Fleming, to recover a debt paid by the Frenchman to the treasury of his own country, in obedience to a French decree of this kind during a war between the two nations.† It could not be expected that a French Court should decide otherwise with reference to a decree of its own Government. Sir Matthew Hale, also, in his *Pleas of the Crown*, vol. i. p. 95, says, “that by the law of England debts and goods found in this realm belonging to alien enemies belong to the King, and may be seized by him;” but the books referred to do not furnish an instance of the seizure of debts, or a decided case in support of the *legality of such a seizure. And by the statute of *Magna Charta*, cap. 30, merchant strangers are, upon the breaking out of a war, to be attached and kept without harm to body or goods, until it shall be known how the English merchants are treated by the sovereign of their State, and if the latter are safe there, the former are to be safe here. So that foreign merchants could suffer nothing in England unless by way of retaliation and reprisal. So early as the time of Grotius opinions had been entertained against the right of confiscating incorporeal things; and there is nothing to be found in the great work of that very learned author which can give countenance to such a right. On the contrary, in lib. iii. c. 7, s. 4 of the *Treatise de Jure Gentium*, there is an allusion to the opinion of some “*qui dicunt incorporalia belli jure non acquiri*,” and Grotius himself does not controvert this opinion in general, but supposes it to admit of qualification in the case of a captive slave; and alludes to it in that way, after having remarked that, “*res omnes quæ captæ*

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† *Recueil d'Arrêts Notables des Cours Souveraines de France, &c. par Johan Pepon*, Norw. W. Paris, 1601, 4to.

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fuerant, cum persona acquiruntur domino." But the proposition last mentioned does not, in truth, furnish any qualification of the opinion to which Grotius alludes; for incorporeal things cannot be taken; and the dominion of corporeal things actually taken is in general acquired by the capture of them, and the title of the captor to them is not less valid where their owner is not taken, than where he is; as is observed by Puffendorff, at the end of the 22nd sect. of lib. viii. c. 6, of the Treatise de Jure Naturali et Gentium. At the beginning of that section this learned author gives the rule as follows: "Circa adquisitionem incorporalium in bello peculiariter observandum, ista non adquiri, nisi cum subjecto, cui inherent." He then proceeds to notice, *that incorporeal rights may be annexed to corporeal things conquered, as to farms, rivers, harbours, towers, and countries, (but even as to these he observes that the nature of the original annexation must be regarded,) or to persons; and as to the latter, he distinguishes between those who live "extra civitatem in statu mere naturali," (all whose things he says are taken with the person, or may be, because there is no one to oppose it,) and those who live in civitate; as to whom he says, "unde si civis ab hoste captus fuerit, bona istius, quæ simul capta non fuerunt, non acquiruntur capienti; sed ad eum perveniunt, quem leges civiles ad successionem vocabant si iste naturali morte functus esset." Now if things belonging to a captive enemy, but not actually taken, do not pass to the conquering enemy, how can things belonging to a person not made captive be legally acquired by an enemy, who is not a conqueror either as to the person or the things; which is the case of the creditors and of the debt in question? This doctrine of Puffendorff, that "incorporalia bello non acquiruntur," is fortified by some of the arguments suggested by Quintilian, lib. v. c. 10, as proper to have been urged before the Amphictyons on occasion of the claim made by the Thebans upon the Thessalians for the payment of a hundred talents, lent to them by the Thebans, and secured by some written instrument, which Alexander had found and seized at the conquest of Thebes, and had given to the Thessalians, who were then serving with his army. This is the transaction referred to by Vattel in the passage before quoted, and from which he seems to have deduced

the proposition as to the right of confiscation upon which the defendant has placed so much reliance in the present case. In favour of the claim of *the Thebans, Quintilian suggests, “non potuisse donari a victore jus, quia id demum sit ejus, quod ipse teneat; jus quod sit incorporale, apprehendi manu non posse.” And again: “Non in tabulis esse jus.” Quintilian suggests arguments in favour of the Thebans only; Puffendorff, at the 23rd section of the book before quoted, takes upon himself to suggest an answer. But it will be found that he puts the argument upon the ground of the absolute conquest and subjection of the city and state of Thebes and the Thebans. Grotius, also in book iii. c. 8, s. 4, controverts the reasoning of Quintilian on this transaction, but he does so upon the ground afterwards taken by Puffendorff, namely, the entire conquest of the Theban state. “Nam qui dominus est personarum, idem et rerum est, et juris omnis quod personis competit. Qui possidetur, non possidet sibi, nec in potestate habet, qui non est suæ potestatis.” And although Grotius mentions this transaction as an instance of his proposition, “Incorporalia jura, quæ universatis fuerant, fient victoris, quatenus velit;” he does not draw from it any conclusion as to the right of confiscating private and individual debts, as Vattel has done. It was admitted that, notwithstanding all the violent measures to which recourse has been had during the extraordinary warfare that we have witnessed in our own times, this ordinance of the Court of Denmark stands single and alone, not supported by any precedent, nor adopted as an example in any other state. The ordinance itself, however, so far as we can learn from this case, was not followed up by any practical measure of compulsion upon the subjects of Denmark. Nothing in the nature of process against the defendant to enforce the payment of this particular debt, nothing analogous to the seizure or condemnation of corporeal *things taken in the time of war occurred on this occasion; and although the commissioners appointed under the ordinance to receive the sequestered monies were informed of this debt as early as the year 1807, yet the defendant did not pay the money until 1812. An allusion was made in the course of the argument to a statute of our own country, the 34 Geo. III. c. 79. This, however, was not an act of

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confiscation to the benefit of the state, but a measure of policy not less generous than lawful, by which at the same time that the transmission of money to the enemies of the State was prevented, the money itself was called in, secured, and kept for those to whom it was due, until the return of peace should enable them to receive it. Considering, therefore, that the right of confiscating debts contended for on the authority of these citations from Vattel is not recognised by Grotius, and is impugned by Puffendorff and others, that such confiscation was not general at any period of time, and that no instance of it, except the ordinance in question, is to be found for something more than a century, we think our judgment would be pregnant of mischief to future times, if we did not declare, that in our opinion this ordinance, and the payment to the commissioners appointed under it, do not furnish a defence to the present action; and if they cannot do this of themselves, neither can they do so by the aid of the proceedings in the Danish Court. The parties went into that Court expecting justice, according to the then existing laws of the country, and are not bound by the quashing of their suit, in consequence of a subsequent ordinance, not conformable to the usage of nations, and which, therefore, they could not expect, nor are they or we bound to regard.

Postea to the plaintiffs.

DOE, ON THE DEMISE OF BATTEN, *v.* MURLESS.†
(6 M. & S. 110—114.)1817.
Feb. 6.

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In ejectment by the vendee of a term sold under a *fi. fa.* against the defendant in execution, it is sufficient to produce the *fi. fa.* without proving a copy of the judgment. And where it appeared that the term had been granted to defendant's father, and that on his death, intestate, his son J. B. entered and took administration, and was possessed till his death, and that on his death, defendant, his brother, entered, and that by indenture between defendant and B. M. (concerning other premises) it was recited that defendant was legal personal representative of J. B.: Held, that this was *prima facie* evidence that the term was vested in defendant.

In ejectment for two closes of arable land and pasture, called Huish's, situate at Thornfalcon, in the county of Somerset, tried before HOLROYD, J. at the last assizes, the case was thus:

The plaintiff claimed as purchaser of a term, seized and sold by the sheriff under a writ of *fi. fa.*; and in order to shew his title, produced a lease 14th February, 1793, from H. W. Portman to B. Murless (the defendant's father) of the premises in question, for ninety-nine years, determinable on three lives, of which the defendant's remained, and proved that the father died about seven years ago intestate, and that his son, J. B. Murless (brother of defendant) entered and was possessed until his death, about two years ago, and produced letters of administration, granted to J. B. Murless, to his father's estate. The plaintiff also produced an indenture of the 22nd July, 1814, between the defendant and Robert and H. W. Meade (relating to other premises also leased to the defendant's father by H. W. Portman) which recited that the defendant was the legal personal representative of the said J. B. Murless, and he conveyed as such an equity of redemption to the said R. and H. W. Meade. The defendant was proved to be then and to have been in possession of the premises in question ever since the death of J. B. Murless. The writ of *fi. fa.* founded on a judgment obtained by Robert Meade against the defendant was put in, and it was proved that *the premises in question were levied under it; and a bill of sale from the sheriff to the lessor of the plaintiff, was

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† Cited and applied in judgment of the Court of Appeal in *Governors of Magdalen Hospital v. Knotts* (O. A. 1878) 8 Ch. D. 709, 724, 47 L. J. Ch. 726.—R. C.

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put in and proved. And upon exception taken, that a copy of the judgment ought to be produced and proved, the case of *Doe d. Emmett v. Thorn* † was cited in answer, and the learned Judge over-ruled the objection, but reserved the point, and there was a verdict for the plaintiff.

Moor, for the defendant, renewed the objection in the last Term, upon a motion for a new trial, and quoted Gilb. Evid. 9, that in ejectment upon an elegit, the plaintiff must prove the judgment as well as the writ. He also objected, that there was no sufficient evidence to shew that the term was legally vested in the defendant.

Lens, Serjt. and *Bayly*, now shewed cause, and as to the last objection they contended, that the recital in the indenture of 1814, coupled with the defendant's possession, was evidence against him, that the interest in the term was vested in him as the legal representative of his brother, who derived it from his father. As to the other objection, they took this distinction, that where the action is brought against the defendant in execution, it is enough to produce the writ; *aliter* if the action be against a stranger; in support of which they quoted several cases.‡ And they said that the authority which the sheriff hath by force of the *fi. fa.* is complete, so that if he sell under it the sale is good, notwithstanding *the judgment be reversed; § but it is otherwise of a sale under a *capias utlagatum*, or delivery upon elegit. Wherefore they concluded that in the present case the sale under the writ was a sufficient title to the plaintiff's lessor.

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Moor, *contrà*, argued, that the plaintiff could only recover upon the strength of his own title, and, therefore, was bound to shew that the term seized and sold by the sheriff was legally vested in the defendant; for of whatever force the writ might be

† 14 R. R. 435 (1 M. & S. 425). § Dyer, 363, pl. 24; *Hoe's case*, 5 Co. Rep. 90 b; *Manning's case*, 8 Co. Rep. 96; *Goodyere v. Ince*, Cro. J. 246.
‡ *Britton v. Cole*, Salk. 409; *Lake v. Billers*, 1 Ld. Raym. 733; *Martin v. Podger*, 5 Burr. 2632; *Hoffman v. Pitt*, 5 Esp. 22.

in other respects, it surely could not authorise the sheriff to transfer any other than the defendant's property. Now possession is properly evidence of a fee, which cannot be taken under a *fi. fa.*, and the defendant might well be the legal personal representative of his brother, as recited in the deed, or even his executor, or administrator, and yet not have the term, because he would not as such represent his father, from whom the term was derived; and if he had not the legal but only an equitable interest, this would not be seizable under this writ.† As to the other point, he said that this difference would be found in all the cases cited, viz. that the defendant in execution was plaintiff, and the sheriff or his vendee was defendant; and the doctrine laid down in those cases as to proof, was referable to that particular position of the parties to the suit.

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LORD ELLENBOROUGH, Ch. J.:

The defendant being in possession, the law will refer that possession to a rightful *rather than to a wrongful title; and there is a course through which that title may be lawfully derived, viz. by supposing the defendant to be privy to the term granted to his father. Now it appears, by a recital in one of the conveyances to which the defendant is party, that he is the legal personal representative of his brother, who was administrator to the father; whence it may be presumed, as against him, either that he obtained administration *de bonis non* to his father, after the brother's decease, or that he took the term by assignment from his brother. The defendant, then, being in possession, under an apparently legal title, and the term having been seized and sold under a *fi. fa.* against him, the remaining question is, whether it is sufficient for the vendee, in an action to recover possession from him, to shew the writ only, or whether he must also prove the judgment. A distinction seems to have been taken in former cases, that where the litigating party is the party against whom the judgment has passed, it is not necessary, as in the case of a stranger, to shew more than the writ. The writ is *primâ facie* evidence of a judgment to which the party

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† *Scott v. Scholey*, 9 R. R. 487 (8 East, 467); *Burden v. Kennedy*, 3 Atk. 739.

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litigant being privy might have complained of it to the Court if wrongful; but not having so done, it must be taken as good against him.

BAYLEY, J. :

I am of the same opinion. One objection is, that the term which it appears was granted to the defendant's father was not shewn to have become vested in the defendant; but I take it that possession was *primâ facie* evidence against the defendant that the interest in the term had become vested in him. If his possession were referable to some other title, it was for him to shew it, for this must be a matter lying within his knowledge.

[*114] *As the evidence now stands, there is, I think, a *primâ facie* case, that the defendant was in as assignee. The next question is, whether the plaintiff was bound to produce a copy of the judgment. Now the cases of *Lake v. Billers* and *Martin v. Podger* give the rule, that where the action is brought by the person against whom the *fi. fa.* issued, it is not necessary for the sheriff to produce a copy of the judgment, but that it is otherwise where the action is brought by a stranger; and the reason for this seems to be, because the party against whom the judgment has passed might have applied to set it aside, if there were error attending it; and if he omit to do so, it is presumed, from his acquiescence, that the judgment is right. Now taking this to be the rule, it applies, as it seems to me, as well to a case where the vendee of the sheriff is a party, as where it is the sheriff himself, and where he is plaintiff as well as where he is defendant.

HOLROYD, J. : †

I am also of the same opinion. By the conveyance in 1814, the defendant professed to assign some interest, which he held as the legal personal representative of his brother; and his being in possession of the premises in question would, as it seems to me, be evidence to charge him as assignee. Upon the other point; as this was an execution against the defendant

† Abbott, J. left the Court pending the argument.

himself, he might have come to set it aside, if there had not been an available judgment to support it; in such a case, therefore, I take it to be settled, that the writ alone is sufficient title to a *bonâ fide* purchaser.

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Rule discharged.

REDE *v.* FARR.

(6 M. & S. 121—126.)

1817.
Feb. 10.

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A proviso in a lease for years (whereby the rent is payable on a day certain, at the mansion-house of lessor,) that if the rent shall be unpaid for forty days after the day whereon it is reserved (although not demanded), the lease shall be void, does not make the lease voidable by the lessee by reason of his having overstayed the forty days allowed for payment; and in debt by lessor on bond given by lessee and defendant in a penal sum, conditioned for payment of said rent at the day and place mentioned in said lease, plaintiff may assign for breach, non-payment of rent at the day and place, without shewing a demand of the rent.

DEBT on bond dated 7th December, 1813, in the penal sum of 6,000*l.*, and the plaintiff set forth the condition, whereby (after reciting that he, by indenture bearing even date with the bond, had demised to James Cuddon certain lands and tithes situate at Letheringham and Hoo, in the county of Suffolk, for twelve years from the 11th of October then last, at the yearly rent of 532*l.*, payable upon the 11th of October in every year; and that the defendant and Robert Fiske, in order to secure to the plaintiff the regular payment of the said rent, had agreed to enter into the said bond), it was conditioned that if Cuddon, or the defendant, or Fiske should pay the said rent at the day and place named in the said indenture, the bond should be void; and the plaintiff assigned for breach, the non-payment by Cuddon, or the defendant, or Fiske, of the said rent at the day and place; and that on the 11th of October, 1815, 182*l.* 7*s.*, parcel of one year's rent (the residue being satisfied), was in arrear.

The defendant cravedoyer of the indenture, whereby the said rent was reserved payable as aforesaid to the plaintiff at his mansion-house at Barrham, "provided always, and these presents are upon this condition, that if the said yearly rent of

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532*l.*, or any part thereof, shall be *unpaid by the space of forty days next after the day or time whereon the same is hereinbefore reserved (although not demanded), then this demise, and every article, clause, and thing herein contained shall cease, determine, and be utterly void to all intents and purposes, anything herein contained to the contrary thereof in any wise notwithstanding ;” and Cuddon covenanted to pay the said rent at the time and place appointed, and according to the true intent of the said indenture. Whereupon the defendant pleaded that after the making of the indenture, and before the commencement of this suit, and before the 11th October, 1815, to wit, on the 11th October, 1814, 492*l.*, parcel of the said rent aforesaid for one year then elapsed, became due, and remained unpaid by the space of forty days and more, to wit, for the space of fifty days next after the day whereon the rent was reserved, whereby the said indenture, and every article, clause, and thing therein contained, as also the said bond, ceased, determined, and became void ; and that afterwards Cuddon gave notice to the defendant not to pay the plaintiff any rent under the lease.

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Replication that Cuddon fraudulently and without the consent, and against the will of the plaintiff, withheld from him the said arrears of rent by the space of forty days, and upwards, next after the 11th of October, 1814, for the purpose thereby, as far as in him lay, of making the lease void ; but that the plaintiff never did in any way assent thereto, or re-enter on the said demised premises, or do any act to make void the said demise, or to enforce or confirm the said supposed forfeiture ; and that Cuddon hath since paid, and the plaintiff hath accepted the said arrears of rent ; and that Cuddon since the supposed forfeiture accrued, *to wit, on the 12th of October, 1815, paid to the plaintiff, and he accepted from Cuddon, subsequent rent, to wit, 349*l.* 13*s.*, remainder of the sum of 532*l.*, for one year’s rent accrued to the plaintiff on the 11th of October, 1815, and that after the 11th of October, 1814, and after the expiration of forty days then next following and continually hitherto, Cuddon hath held and enjoyed, and still holds and enjoys the demised premises under and by virtue of the said demise.

Demurrer assigning for cause that the plaintiff, in his

replication, attempts to put several and distinct matters in issue, and matter wholly immaterial. Joinder.

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v.
FARR.

Gifford, who argued on Friday last in support of the demurrer, did not address himself to the replication, which seemed, as agreed on both sides, to be multifarious and bad, but he took exception to the declaration, that the plaintiff had not laid any demand of the rent, without which, more especially where a surety is concerned, a penalty is not forfeited.† So in the case of re-entry, or a *nomine pœnæ*.‡ 2ndly. He argued in support of the plea, that the lease was void immediately upon non-payment of the rent for forty days. And he took a distinction between a proviso for re-entry in a lease for years, and a proviso that the lease shall be void; that in the one case an entry is required to determine the lease, but not in the other; *aliter* of a condition annexed to an estate of freehold, for there, though the condition be that the estate shall cease or be void, yet is an entry *necessary, because an estate of freehold cannot begin nor end without ceremony.§ And a lease which is *ipso facto* void by the breach of the condition, cannot be made good by any acceptance afterwards; || much less can this lease be set up where nothing subsequent has been done to give a colour to it, and where the defendant being only a surety, it is enough for him to shew that the lease has by the contract of the lessor himself, become void.

[*124]

The COURT adjourned the hearing of the argument on the other side; and now, when *Richardson* for the plaintiff, was about to address the Court,

LORD ELLENBOROUGH, Ch. J., delivered judgment :

The Court have looked into the cases and authorities cited, and are of opinion, that the proviso does not vacate the lease entirely, although it does as against the lessee. It does not

† *Sir R. Grobham's case*, Hob. 82;
1 Roll. Abr. 460, pl. 10, 13; *Speccot*
v. *Sheres*, Cro. Eliz. 828; *Chapman v.*
Chapman, Cro. Car. 76.

‡ *Maund's case*, 7 Co. Rep. 28 b,
second resolution; *Owen*, 111, per

POPHAM, Ch. J.

§ Co. Litt. 214 b.

|| *Sir Moyle Finch's case*, Cro. Eliz.
220; *S. O. Moor*, 291; *Pennant's case*,
3 Co. Rep. 64 b; 1 Roll. Abr. 475,
pl. 3; *Ibid.* 476, pl. 2.



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[*125]

follow, even where leases are vacated by Act of Parliament, as Bishop's leases, or leases made without the consent of dean and chapter, that they may not be enforced by persons who are not privy or acting in contravention of any law. In this case, as to this proviso, it would be contrary to an universal principle of law, that a party shall never take advantage of his own wrong, if we were to hold that a lease, which in terms is a lease for twelve years, should be a lease determinable at the will and pleasure of the lessee; and that a lessee by not paying his rent should be at liberty to say that the lease is void. On this principle, even if it were *not borne out so strongly as it is by the current of authorities, it would be sufficient to hold that the lease was only void as against the lessee, not against the lessor. In Co. Litt. 206 b. it is laid down: "If a man make a feoffment in fee, upon condition that the feoffee shall re-infeoff him before such a day, and before the day the feoffor disseise the feoffee, and hold him out by force until the day be past, the state of the feoffee is absolute; for the feoffor is the cause wherefore the condition cannot be performed, and therefore shall never take advantage for non-performance thereof. And so it is if A. be bound to B. that J. S. shall marry Jane G. before such a day, and before the day B. marry with Jane, he shall never take advantage of the bond, for that he himself is the mean that the condition could never be performed. And this is regularly true in all cases." If that be a principle of law, that a party shall not take advantage of his own wrong, then a lessee shall not avail himself of his own act to vacate his lease. As to a demand, we do not think that any was necessary, inasmuch as the rent was to be paid at the house of the lessor. What sort of a demand can the lessor make at his house if the lessee is absent? This objection, therefore, cannot apply to a case where time and place for payment of the rent are thus fixed by the instrument. On these grounds we are of opinion, that there ought to be judgment for the plaintiff.†

† If A. be bound by obligation to B. that the son of A. shall serve B. for seven years, if B. take him, and after, within the term, command him

to be gone from him, the obligation is not forfeited. 22 Edw. IV. 26 (Vin. Condition, Q. c.).

So where the condition of an obli-

BELL v. ALEXANDER.†

(6 M. & S. 133—134.)

1817.
Feb. 12.

The plaintiff cannot treat a plea as a nullity, and sign judgment, unless it be palpably a sham plea.

[133]

ASSUMPSIT for goods sold and delivered, and upon the money counts. Plea to the two first counts (for goods sold) judgment recovered in the court of exchequer, and as to the others, payment and satisfaction. *The plaintiff having signed judgment as for want of a plea, it was moved to set the judgment aside for irregularity.

[*134]

Storks shewed cause, on the ground that these were sham pleas and merely for delay, which was evidenced by their driving the plaintiff in taking issue upon them to two distinct modes of trial, they might, therefore, properly be treated as nullities; and he cited *Penfold v. Hawkins*,† *Draycott v. Pilkington*.§

F. Pollock, *contra*, contended that the pleas were regular in form, and if the matter were doubtful whether they were sham pleas or not, the plaintiff should not have signed judgment of himself, but should have moved the Court for that purpose.||

PER CURIAM :

Unless the inference be irresistible, the plaintiff is not at liberty to take upon himself to pronounce that the plea is a nullity.

Rule absolute.

gation was, that the obligor should surrender a certain copyhold, and also should suffer the obligee and his heirs peaceably to enjoy the land without interruption of any one; the *obligee entered, and after, on non-payment of rent, the lord evicted him according to the custom: Held, no breach, because it was the act of the plaintiff himself.

So if a thing to be performed by a condition cannot be performed without the presence of the obligee, his

absence shall excuse; as to make feoffment to the obligee, if he be not present, performance is excused. 12 Hen. IV. 23 (Vin. Condition, U. c.)

See also *Doe v. Banks*, 4 B. & Ald. 401.

† Cf. *Phillips v. Bruce*, p. 334, *infra*; and *Blewitt v. Marsden*, 10 R. R. 284, and see note there.—R. C.

‡ 2 M. & S. 606.

§ 5 M. & S. 518.

|| *Blewitt v. Marsden*, 10 R. R. 284 (10 East, 237).

[*126, n.]

1817.
Feb. 12.

PHILLIPS *v.* BRUCE AND OTHERS.†

(6 M. & S. 134—136.)

[134]

The plaintiff may sign judgment as for want of a plea, if the plea be palpably a sham plea.

ASSUMPSIT. The four first counts were on four bills of exchange, the first of them bearing date 1st of May, 1816, and the others after that date, and the four last were money counts.

[135]

Plea as to 1,000*l.*, part of the sums in the four last counts, *non assumpsit*; and as to the promises in the four first counts, that plaintiff on the 14th of March, in the 56 Geo. III., in the mayor's Court, filed his bill in a plea of debt against the defendants for 400*l.*, and *taliter processum*, that on the 1st of April it was ordered that the defendants should pay 400*l.* into Court, and that they accordingly paid the same, which on the 2nd of April the plaintiff accepted, with taxed costs, in discharge of the action, and concluded with a verification. And as to 800*l.*, residue of the sums in the four last counts, that the plaintiff in Easter Term, 56 Geo. III. impleaded defendants in the exchequer of Ireland in trespass on the case on promises to the damage of the plaintiff of 12,000*l.* for not performing the very same identical promises and undertakings in the last four counts mentioned as to the last mentioned sum, parcel, &c., and *taliter processum*, that plaintiff afterwards, in the same Easter Term, recovered against defendants 800*l.* for his damages, &c., as by the record, &c., which judgment still remains, &c.

Judgment having been signed as for want of a plea, and a rule *nisi* obtained for setting this judgment aside,

Lawes, who was against the rule, insisted that it was obvious upon the face of it that this was a sham plea, and merely for delay; for as to that part of it which relates to the judgment in the mayor's Court, the judgment is prior to the date of the bills on which the cause of action arose; and the whole plea is calculated to perplex and to produce diversities of trial upon the several issues. And notwithstanding that it was urged by

† Cf. *Bell v. Alexander*, p. 333, *supra*.—B. C.

Scarlett and Comyn in support of the rule, that the plea *in every part of it did in effect tender an issue to the country, and that it amounted to accord and satisfaction, and though perhaps it might be exceptionable in point of form, it was not therefore necessarily a nullity, yet

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BRUCE.
[*136]

Per CURIAM :

It is a palpable sham plea. A judgment recovered before the cause of action accrued, can never be in satisfaction of the cause of action, and, besides, the whole frame of the plea is manifestly contrived to introduce perplexity and enhance the costs. The inference doubtless must be strong and pregnant, and almost irresistible before the Court will pronounce that a plea is a sham plea, and so it is here. And the Court adverted to the old rule, viz. that counsel should set their hands to the books delivered to the Judges, which was anciently so ordered, that the Court might not be troubled with frivolous pleas.

Rule discharged.

K. B. EASTER TERM.

JACOB v. JOSEPH HART.†

(6 M. & S. 142—143; S. C. at Nisi Prius, 2 Stark. 45—47.)

1817.
April 24.

[142]

A bill of exchange was drawn by mistake, as dated on the corresponding day of the preceding month, instead of the day when drawn, and carried by the payee to defendant for acceptance, who accepted it, noticing the mistake; afterwards, the payee, upon communication with the drawer, altered the date to the day when drawn, and acquainted defendant with what he had done, who approved the same; before the bill was negotiated, defendant, at the request of payee, that he would make it payable in London, added to his acceptance the words, "payable at Mr. A. Isaacs, Saint Mary Axe, London:" Held, that a new stamp was not required on account of either of these alterations.

INDORSEE against the acceptor of a bill of exchange, drawn on the 3rd of April, 1815, by Moses Hart, on the defendant, payable

† Accord. *Byrom v. Thompson* of Exchange Act, 1882, s. 64, s. 97 (1839) 11 A. & E. 31; and see Bills (3).—R. C.

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v.
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twelve months after date to J. Myers or order,—accepted, payable at A. Isaacs, St. Mary-Axe, London. Plea non-assumpsit. At the trial before Lord Ellenborough, Ch. J., at the London sittings, the case was thus :—

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The body of the bill was in the handwriting of Myers, the payee, who drew it on the 3rd of April, but by mistake dated it the 3rd of March, it being intended that it should bear date on the day when it was drawn. Myers handed it to Moses Hart, who signed it as the drawer. Myers then took it to the defendant for acceptance, who observed the mistake, and that the date should have been the 3rd of April, but accepted it with the date of the 3rd of March. Afterwards Myers, upon communication with Moses Hart, altered the date to the 3rd of April; and upon seeing the defendant soon afterwards, told him what he had *done, when the defendant said “that is right.” About nine months after the bill was drawn, and before it had been negotiated, Myers requested the defendant, for his convenience, to make the bill payable in London, and then the words “payable at Mr. A. Isaacs, St. Mary-Axe, London,” were added by the defendant.

At the trial before Lord Ellenborough, Ch. J., *Topping*, for the defendant, objected, that these alterations rendered the bill a new bill, and required a fresh stamp. But the objection was overruled, and a verdict was found for the plaintiff.

Topping now moved for a new trial, or to enter a nonsuit, renewing his objection; but

The Court were of opinion that as the alteration of the date was in furtherance of the original intention of the parties, and to correct a mistake, this did not make it a new bill; † and as to the other alteration, inasmuch as it was made with the acquiescence of the acceptor, and the stamp-laws did not impose any duty on an acceptance *quâ* acceptance, this objection did not hold.‡

Rule refused. §

† See *Kershaw v. Cox*, 3 Esp. 246; and *Brutt v. Picard*, 1 R. & M. 37, S. P.

‡ *Quare* as to this last point, since

the case of *Roue v. Young*, 2 Brod. & Bing. 165; but see stat. 1 & 2 Geo. IV. c. 78, s. 1.

§ 2 Stark. 45.

KERR AND ANOTHER v. WILLAN.†

(6 M. & S. 150—152; S. C. at Nisi Prius, 2 Stark. 53—56.)

1817.
April 26.

A carrier's notice limiting his liability is not available without evidence that it came to the knowledge of the customer.

[150]

ASSUMPSIT for the non-delivery of a parcel of black cloth, delivered to the defendant to be safely and securely carried from London to Dumfries, for reasonable reward, &c. Plea, *non-assumpsit*, and the defendant paid 10*l.* 10*s.* into Court. At the trial before Lord Ellenborough, Ch. J. at the last London sittings, the case was thus:—

The cloth was sent by the waggon from Gloucestershire, *directed to the plaintiffs at Dumfries, and upon its arrival in London, was transferred from the Gloucestershire waggon-office to the waggon-office of the defendant, to be forwarded to Dumfries. The defendant was the proprietor of the Leeds and Scottish waggon, and in a conspicuous part of his office had stuck up a large board, on which was painted a notice (in the usual form given by carriers), limiting his liability to the amount paid into Court. The porter who carried the cloth from the Gloucestershire waggon-office to the defendant's office, and who was in the habit of going thither very frequently, admitted that he knew there was a board there as well as at his own office, but said that he had never read it, or knew the contents. And it was objected, that inasmuch as the defendant had not proved that the plaintiffs had any knowledge of the notice, the defence failed; and his Lordship being of that opinion, the jury, under his direction, found a verdict for the plaintiff for 5*l.* 5*s.* 6*d.*

[*151]

The *Attorney-General* now moved for a new trial, contending that a personal notice to each customer was not necessary, but it was sufficient if a carrier used all practicable means to publish his notice, by the circulation of hand-bills, or by posting up a notice in legible characters, in a conspicuous part of his place of business; for otherwise it would be impossible for him to

† See the later cases as to restrictive conditions printed on tickets or receipts reviewed in *Richardson & Co. v. Rowntree*, '94, A. C. 217, 6 R. 95, 63 L. J. Q. B. 283; *Watkins v. Rymill* (1883) 10 Q. B. D. 178.—F. P.

KERR
WILLAN.

limit his responsibility; which it had been frequently decided that he might do. And he instanced the case of the bleachers of Manchester, where a general lien was established upon proof of an advertisement to that effect, and notice by the contracting party.†

[152] LORD ELLENBOROUGH, Ch. J.:

The question was left to the jury upon the notice; and the requiring notice in such cases, although it may augment the duties of the carrier, is certainly not imposing on him an insurmountable difficulty; for this would be removed if a receipt were given for each delivery, with a notice printed on the receipt restraining his liability.

BAYLEY, J.:

If a carrier never took in a parcel without a special receipt as mentioned by my Lord, he would be indemnified.

Per CURIAM:

Rule refused.

1817.
April 26.

PORTER AND BRISTOW v. TAYLOR.

(6 M. & S. 156—157; S. C. at Nisi Prius, 2 Stark. 50.)

[156]

Payment to one of two partners of a partnership debt, after they had appointed a third person to collect the debts, and with notice of such appointment, held good.

ASSUMPSIT for money paid by the plaintiffs, as brokers for the defendant, in effecting policies of insurance. Plea, *non assumpsit*.

At the trial before Lord Ellenborough, Ch. J. at the London sittings, the case was thus:—The plaintiffs carried on business as insurance brokers in partnership up to July, 1812, at which time their partnership was dissolved. Doubts being then entertained, whether the outstanding debts due to the partnership would be sufficient to cover the claims against it, it was agreed between the plaintiffs, at the request of Porter, that the brother of Bristow should collect and pay the debts of the partnership. Bristow's brother delivered to the defendant a statement of his account with the plaintiffs, and requested payment of the

† *Kirkman v. Shawcross*, 3 R. R. 103 (6 T. R. 14).

balance, acquainting him at the time with the dissolution of the partnership, and that he had been authorized to collect and pay the debts; the defendant approved of the arrangement, and said that he should not then pay him the balance, but would pay him in the usual course of payment; a second application was afterwards made by Bristow's brother for payment, when the defendant requested a few days' further indulgence, saying he would then pay the money. He called again a third time, when the defendant acquainted him that he had paid the money to Porter. And it was proved, on the part of the defendant, that he had so done. His Lordship being of *opinion that this was a good payment, directed a nonsuit, with liberty to the plaintiff to move.

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v
TAYLOR.

[*157]

Bolland accordingly moved, contending that payment by the defendant after the notice received, and assent given by him to the arrangement, was invalid. Here was an agreement between the partners to delegate the receipt of the partnership debts to a third person for the mutual benefit of themselves and of the creditors, which the defendant, notwithstanding notice and assent given to the same, persisted in contravening; the payment, therefore, was of his own wrong. *Henderson v. Wild.*†

LORD ELLENBOROUGH, Ch. J. :

Does this amount to more than an authority to the brother of Bristow to receive, so that if payment had been made to him, it would have been a good discharge? But this might well be, without barring Porter of his rights: there must be something exclusive in the agreement to bar him, otherwise his original rights remain.

BAYLEY, J. :

There was nothing in the agreement, as proved, to tie the hands of Porter from receiving the debt, nor does the notice given to the defendant import that Porter was in any manner restrained.

Per CURIAM : ‡

Rule refused.

† 2 Camp. 561.

‡ Holroyd, J. had left the Court.

1817.
April 29.

[160]

SMITH v. CUFF.†

(6 M. & S. 160—166.)

Where defendant, being a creditor of plaintiff, entered into a composition-deed with the other creditors to receive 10s. in the pound, under an agreement with plaintiff that he would give defendant his promissory notes for the remainder of the debt, which notes were accordingly given, and the composition was paid to defendant, and he negotiated the promissory notes, the holder of one of which enforced payment from plaintiff by action: Held, that plaintiff might recover back the amount from defendant in an action for money paid, had, and received.

ASSUMPSIT for money paid, had, and received, and on an account stated. Plea, *non-assumpsit*. On the trial before Lord Ellenborough, Ch. J. at the London sittings after Easter Term, 1816, the plaintiff was nonsuited, subject to the opinion of the Court upon the following case:—

In July, 1815, the plaintiff, who was a trader, became insolvent, and at a meeting of his creditors, at which the defendant was not present, offered them a composition of 10s. in the pound. The following memorandum of agreement, bearing date the 1st of August, 1815, was accordingly entered into:—

“We, the undersigned creditors of Thomas Smith, do agree to accept a composition of 10s. in the pound on our respective debts, the same to be secured by bills of exchange for 8s. in the pound, at two months, drawn by Mr. Smith and accepted by Mr. Beckwith, and by other bills accepted only by Smith for 2s. in the pound, at twelve months.”

The defendant at the time of the making of this agreement was a creditor for 485*l.* 12*s.* 8*d.*, and as such was applied to by Messrs. Clutton, the plaintiff's attornies, to come into the composition and sign the agreement, but at that time he refused, saying he must first see the plaintiff. On the 2nd of August the defendant wrote to the plaintiff the following letter:—

“2nd August, 1815.

“SIR,—Messrs. Clutton & Co. have called on me twice; not meeting, have left word will call to-morrow morning at eight o'clock; merely apprise you shall give them the same

† *Atkinson v. Denby* (1860) 7 H. & N. 934, 31 L. J. Ex. 362.

[161]

answer; will have a commission of bankruptcy or payment of the whole by instalments. So if any thing fresh to say, had better let me know previous to that time.

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CUFF.

(Signed) "J. CUFF, JUN."

On the 3rd of August the defendant again wrote to the plaintiff as follows:—

"3rd August, 1815.

"SIR,—Messrs. Harben & Co. have presented a paper to sign for a composition, which have refused to accede to. It now only remains to take the steps stated before, as it is only waste of time to wait longer.

(Signed) "Jos. CUFF & Co."

"Merely write this to apprise you the state of the affairs. My debt was evidently contracted when well known to yourself of your insolvency."

In consequence of this communication, the plaintiff agreed to give the defendant two promissory notes, one for 174*l.* 5*s.* 1*d.*, and the other for 43*l.* 11*s.* 3*d.* to make up the full amount of his debt; which two promissory notes, one dated the 25th of July, 1815, at nine months after date for value received, the other bearing the same date and of the like import, at thirteen months after date, were made by the plaintiff and delivered to the defendant; but there was no evidence at the trial when these notes were so made and delivered.

On the 7th of August, the defendant signed the agreement of composition, and on the 11th, a bill of exchange for 174*l.* 5*s.* 1*d.* drawn by the plaintiff and accepted by Beckwith, and also a promissory note for 43*l.* 11*s.* 3*d.* made by the plaintiff conformably to the last-mentioned agreement, respectively dated the 1st of August, 1815, were delivered to the defendant for the full amount of 10*s.* in the pound on the whole of his said debt; and he then executed a release with the other creditors. By this instrument, after reciting that Smith stood indebted to the re-leasees in the several sums set opposite to their respective names, which he was unable to satisfy, and had therefore

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[*163]

applied to them to accept a composition of 10*s.* in the pound, to be secured by bills of exchange for 8*s.* in the pound (drawn and accepted as in the agreement mentioned), and by promissory notes for 2*s.* in the pound (drawn as in the agreement mentioned), and which they had consented to take in full satisfaction of their respective debts; the several parties to those presents, in consideration of the said bills of exchange and promissory notes being given to them respectively at or before the sealing and delivery of those presents, the receipt whereof they thereby respectively acknowledged, remised, released, and discharged Smith, his heirs, executors, and administrators, of and from all and all manner of action, suit, causes of action, bills, bonds, debts, &c, claims and demands whatsoever, both at law or in equity, which against Smith each or every of them then had or thereafter might have by reason of all and every the debts to them respectively due and owing from Smith, or by reason of any other matter, cause, or thing whatsoever, from the beginning of the world unto the day next before the day of the date of *those presents (save only the aforesaid bills of exchange and promissory notes); and the said several creditors did for themselves severally, and for their respective heirs, executors, and administrators, &c. covenant, in pursuance of the terms of the release, not to bring actions, &c. against Smith. Proviso, that if Beckwith and Smith, or one of them, should not duly pay their bills for 8*s.* in the pound, or if Smith should not duly pay his promissory notes for 2*s.* in the pound, the release and covenants of the creditors, whose bills or notes should not be paid, should be void. Beckwith's acceptance for 8*s.* in the pound on the defendant's debt was duly paid. The plaintiff's note for the remaining 2*s.* in the pound was not due at the time of the trial. The note for 174*l.* 5*s.* 1*d.* given by the plaintiff to the defendant, was, about two months before it became due, indorsed and delivered by the defendant to one Douglass, with whom he had previous dealings in trade, and who gave him his acceptance for the amount, that being more negotiable than a promissory note. About a month before it became due the defendant wrote to the plaintiff as follows :—

“25th March, 1816.

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CUFF.

“SIR,—Since seeing you are resolved to let the matter in question take its course, merely apprise you, the parties who have got it will enforce the matter; therefore, of course, you will be prepared to prevent personal inconvenience.

(Signed) “Jos. CUFF & Co.”

The note was at Douglass's bankers when it became due, and was never returned to the defendant, but was put by Douglass into the hands of the defendant's attorney in the present action, he having been recommended *to him by the defendant. An action was accordingly brought upon it, and the plaintiff, on the 3rd of May, 1816, before the commencement of the present action, paid the full amount and interest, with costs, and the debt was immediately paid over by the attorney to Douglass. The present action is brought to recover the said sum of 17*l.* 5*s.* 1*d.*, the excess beyond the said composition of 10*s.* in the pound.

[*164]

If the Court should be of opinion that the plaintiff is entitled to maintain the action, a verdict to be entered for the plaintiff; if otherwise, the nonsuit to stand.

Comyn, who argued for the plaintiff, quoted the cases of *Cockshott v. Bennett*,† *Jackson v. Lomas*,‡ and *Leicester v. Rose*,§ from which he deduced this principle, that where the creditors in general have bargained for an equality of benefit, it shall not be competent to one of them to secure to himself a partial advantage; for that is a fraud upon the rest. Agreeably to this principle it was held in *Smith v. Bromley*,|| and *Stock v. Mawson*,¶ that the party who paid might recover back the money from the party who received it in fraud of other creditors.

Campbell, *contrà*, admitted the principle laid down on the other side; yet he said, this went only to prevent the defendant

† 1 R. R. 617 (2 T. R. 763).

‡ 4 T. R. 166.

§ 4 East, 372.

|| Doug. 696, n. 3.

¶ 1 Bos. & P. 286.

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v.
CUFF.

[*165]

from having any action on the note, and not to enable the plaintiff to recover back the value, seeing that it had been paid to the indorsee. For the reason why the defendant could not have had any action was *this: that both parties being *in pari delicto potior est conditio defendentis*, so that while the transaction remained open by non-payment of the note, the defendant could not enforce it; but now that it is closed by payment, the plaintiff cannot open it. The defendant is protected by the same rule which would have protected the plaintiff had the note remained unpaid. In *Smith v. Bromley*, and other similar cases,† where the party was allowed to recover back the money, it was upon the ground that he was not *in pari delicto*. Then as to the form of this action; how is it money had and received, when there was no evidence that the money produced by the note ever came to the defendant's hands?

LORD ELLENBOROUGH, Ch. J. :

This is not a case of *par delictum*: it is oppression on one side, and submission on the other: it never can be predicated as *par delictum*, when one holds the rod, and the other bows to it. There was an inequality of situation between these parties: one was creditor, the other debtor, who was driven to comply with the terms which the former chose to enforce. And is there any case where money having been obtained extorsively, and by oppression, and in fraud of the party's own act as it regards the other creditors, it has been held that it may not be recovered back? On the contrary, I believe it has been uniformly decided that an action lies.

BAYLEY, J. :

[*166] The reason assigned in *Smith v. Bromley* for that decision was, that the party who insisted on payment was acting with extortion and oppressively, *and in the teeth of that which he had agreed to accept. And does not this reason apply to the present case? The conduct of the defendant here, is that of one

† *Williams v. Hedley*, 9 R. R. 473 (8 East, 378); *Browning v. Morris*, Cowp. 792.

taking undue advantage of the plaintiff's situation, and endeavouring to extort from him by oppression that which he stipulated not to demand.

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v.
CUFF.

HOLROYD, J. :

With respect to the objection to the form of action, this is money paid to the order of the defendant, or, in other words, money had and received by him through the medium of the person to whom by his order it was paid. Unless it may be recovered in this form, the law would be giving effect to a transaction which it condemns as unlawful, because unjust.

PER CURIAM :

Judgment for the plaintiff.

HORNBY AND OTHERS v. LACY.

(6 M. & S. 166—173.)

1817.
April 29.

A factor, having a *del credere* commission, sold goods for the plaintiffs to defendant without disclosing their names. The defendant knew that he was factor, and the plaintiffs, according to the settled course of dealing between them, drew for the amount on the factor, who before the bills became due stopped payment, and afterwards became bankrupt: Held, that notwithstanding the *del credere* commission, the plaintiffs might have *assumpsit* against defendant for the price of the goods, the balance of the account current between the factor and defendant being at the time he stopped payment in favour of the factor, but at the time of action brought in favour of defendant.

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ASSUMPSIT for goods sold and delivered, money lent, money paid, money had and received, and on an account stated. Plea, general issue. On the trial at the London sittings after Trinity Term, 1814, a verdict was found for the plaintiffs for 132*l.* 14*s.* 6*d.*, subject to the opinion of the Court on the following case: which it was agreed should be turned into a special verdict if the Court should think proper so to direct.

The action is brought to recover the price of two parcels of linens sold to the defendant, who resides and carries on business in London under the firm of Hamley and Lacy, by Messrs. Duckham and Lankester of London. The goods belonged to the plaintiffs, who are linen manufacturers, at

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Bentham, Yorkshire, and were, with others, consigned by them to Duckham and Lankester, as their factors, for sale.

The first parcel was sold on the 25th of April, 1810, for 26*l.* 18*s.*, at four months' credit from the 1st of June, 1810, and the last on the 25th of May, 1810, for 105*l.* 16*s.* 6*d.*, at four months' credit from the 1st of July, 1810. The plaintiffs were in the habit of sending goods to Duckham and Lankester, to dispose of as their factors, and paid them a *del credere* commission. Duckham and Lankester transmitted to the plaintiffs monthly accounts of the sales, made up from the 24th of one month to the 24th of the following month, but in these accounts the names of the purchasers were not stated. The general course of dealing between Duckham and Lankester and the defendant was for them to draw on him, for the goods purchased by him, at the end of two months from the time the credit began to run, bills at two months; that between Duckham and Lankester and the plaintiffs was for the latter to draw upon Duckham and Lankester for the amount of such sales, at the expiration of two months from the first day of the month succeeding that for which the account was rendered, bills at two months; so that it was in regular course for the plaintiffs to draw, and they did draw on Duckham and Lankester on the 1st of August for the goods sold to the defendant on the 25th of April, and on the 1st of September for those sold on the 25th of May. Duckham *and Lankester dealt as factors for many other persons besides the plaintiffs, and had been for some time accustomed to sell goods to the defendant; and they did not communicate to him the names of the persons to whom the goods belonged, but the defendant knew they were only factors. The invoices were entitled, "Messrs. Hamley, Lacey, & Co. bought of Duckham, Lankester, & Co. cotton and linen factors;" and in them it was stated that no short measure or damages should be allowed unless agreed to within three days after the sale. The invoices of the two parcels in question were so entitled, and Duckham and Lankester also on one occasion acted as factors to the defendant. On the 11th of September, 1810, before the credit at which either of the two parcels of goods was sold had expired, and before the bills which had been drawn by

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the plaintiffs according to the usual course became payable, Duckham and Lankester stopped payment, and in January following became bankrupt. The plaintiffs not having been paid by Duckham and Lankester for these goods, on the 23rd of November, 1810, gave notice to the defendant that the goods sold in May were theirs, and required him to pay them and not Duckham and Lankester for them. Duckham and Lankester, besides selling goods to the defendant, as above stated, had a bill-account with him for their mutual accommodation, and kept two separate accounts, the one of the goods, the other of the bill transactions. The defendant kept only one account of the goods and bills. At the time of Duckham and Lankester's stopping payment, there was a balance due to them from the defendant, as appeared upon Duckham and Lankester's books, of 1945*l.* 11*s.* 5*d.* on the goods-account, and at that time there also appeared a balance *in their favour on the bill-account; but in consequence of the defendant having afterwards taken up some returned bills, Duckham and Lankester were debtors upon the two accounts together at the time of the action brought in the sum of 8*l.* 5*s.* The plaintiffs have not been paid for the goods, nor has the defendant paid Duckham and Lankester formally for them.

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v.
LACY.

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The question for the opinion of the Court is, Whether the plaintiffs are entitled to recover? If they are, the verdict to stand; if not, a nonsuit to be entered.

[After argument:]

LORD ELLENBOROUGH, Ch. J. :

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I own I cannot think that a commission *del credere* is to have an effect attributed to it beyond that which regards the benefit of the principal who gives the commission. The commission imports, that if the vendee does not pay, the factor will: it is a guarantee from the factor to the principal against any mischief to arise from the vendee's insolvency. But it varies not an iota the rights subsisting between vendor and vendee.† A somewhat

† The above passage of this judgment is cited and relied on by M. SMITH, J. in *Bramwell v. Spiller* (1870) 21 L. T. 672.—R. C.

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LACY.

different doctrine seems to have originated with *Grove v. Dubois*.† A kind of magic effect was there given to a commission *del credere*, changing the relative position of the owner and buyer; and what is reported to have fallen from CHAMBRE, J., in a later case, is referable to the same authority; but this was set right, as I think, in the judgment in *Morris v. Cleasby*,‡ which was given after much consideration, and, I may add, with the concurrence of two of our learned brethern on this bench, now, unhappily, no more. The ulterior effect given to this commission in the above cases has created the confusion. As to the argument founded on the drawing of bills, if it had amounted to payment, or to a case of mutual credit,§ the argument would have been good. This was very recently considered by us in *Graham v. Dyster*.||

BAYLEY, J. :

[*172] It is important that the relative position of principal and factor should be understood and kept distinct. The factor is agent, the parties to be considered as principals are the owner and buyer. The *owner has a right to look for payment to the buyer, unless by some act in which he has concurred he has deprived himself of that right. When he gives a *del credere* commission, he means to obtain an additional security; that is, the security of the factor; and it would be extremely hard if, instead of having an additional security, he should find that he had only substituted one for another, that he had shifted the responsibility from the buyer to the factor. In *Morris v. Cleasby* ¶ the effect of such a commission was much considered, and it was held that it could not have any such effect. If the vendee pay the factor for the purchase in due course, and according to the contract, he will be protected; but if otherwise, he pays on the credit of the factor.

ABBOTT, J. :

A *del credere* commission is in the nature of a private agreement between factor and principal, and, therefore, cannot vary

† 1 T. B. 112 [overruled by *Barber v. Pott* (1859) 4 H. & N. 759, 28 L. J. Ex. 381].

‡ 16 R. R. 549 (4 M. & S. 574).

§ *George v. Clagett*, 4 R. R. 462 (7 T. R. 359).

|| 6 M. & S. 1.

¶ 16 R. R. 544 (4 M. & S. 566).

the rights of third parties. The present is the case of a sale by a factor, the purchaser knowing him to have been such. Acceptances given, or payment made at the time, according to the usual course of trade, would have discharged the purchaser. No such payment having been made, the principal had a right to step in and require payment to himself. The circumstance of there being a bill-account between the parties does not vary these rights, these being founded on the *del credere* commission.

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LACY.

HOLROYD, J. :

I am of the same opinion with respect to the effect of a *del credere* commission and the sale transaction. Where the party selling is known to be a factor, if the vendee pay the price to him, according to the usual course of his authority to receive, this will discharge him; but it is not by a course of drawing bills between the principal and factor, as stated in the case, that he can be discharged.

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Judgment for the plaintiff.

EDWARDS v. KELLY AND ANOTHER.

(6 M. & S. 204—209.)

1817.
May 6.

Plaintiff having distrained for rent-arrear goods which the tenant was at that time about to sell, agreed with defendants to deliver up the goods, and to permit them to be sold by one of defendants for the tenant, upon defendants' joint undertaking to pay to plaintiff all such rent as should appear to be due to him from the tenant; and he thereupon delivered up the distress: Held, that this was not a promise to answer for the debt of another within the Statute of Frauds.

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Assumpsit tried before Holroyd, J., at the Cornwall Assizes, when a verdict was found for the plaintiff for 398*l.* 11*s.* 2*d.*, subject to the opinion of the Court upon the following case:—

Edward Kelly, on the 18th of March, 1816, and for four years preceding, held part of the Barton of Rame, and tenement Bastard Combe, as tenant to the plaintiff, at the yearly rent of 570*l.*

On the said 18th of March the sum of 398*l.* 11*s.* 2*d.*, being due from him for arrears of rent to the 25th of December, 1815, the

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plaintiff distrained, upon the premises, divers cattle, goods, and chattels of greater value than the rent-arrear, which E. Kelly being at that time about to sell, the plaintiff agreed with the defendants, Thomas Kelly and Robert Brickwood, to deliver up the distress, and permit the same to be sold by Brickwood for E. Kelly, upon the defendants jointly undertaking to pay the plaintiff all such rent as should appear to be *due to him from E. Kelly to the said 25th of December, whereupon the defendants signed the following paper writing :

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“ We, the undersigned, hereby agree and undertake to pay to Thomas Edwards all such rent as shall appear to be legally due to him from Edward Kelly the tenant, of part of the Barton of Rame and tenement Bastard Combe, up to the 25th day of December, 1815.

“ ROBERT BRICKWOOD.

“ Witness, J. ROWE.”

“ THOMAS KELLY.”

The plaintiff, upon the signing and delivery to him of this paper writing, gave up the distress, and by his permission the cattle, goods, and chattels were sold by Brickwood for E. Kelly, and were removed from the premises by the purchasers. The defendants had notice that the sum of 898*l.* 11*s.* 2*d.* was legally due to the plaintiff from E. Kelly, and were requested to pay, but refused.

The question for the opinion of the Court is, whether this case is within the statute 29 Car. II. c. 8, s. 4; and if so, whether, under the provisions of that statute, the plaintiff is entitled to recover?

Bayly, for the plaintiff, argued that this was not a case within the statute. And he took this distinction, that whenever there is a new contract and an original consideration, this is not a case within the statute. In support of which position he relied on *Read v. Nash*,† *Tomkins v. Gill*,‡ *Williams v. Leper*,§ [*206] *Houlditch v. *Milne*,|| and *Castling v. Aubert*.¶ He said that the

† 1 Wils. 305.

‡ Ambl. 330.

§ 3 Burr. 1886; S. C. 2 Wils. 308.

|| 6 R. R. 815 (3 Esp. 86).

¶ 2 East, 325.

present case differed in one respect only from *Williams v. Leper*, viz. that here the plaintiff having the distress in hand, the consideration for the promise was his giving it up; whereas in *Williams v. Leper*, the consideration was his forbearing to make the distress. But the surrendering of a benefit acquired is certainly as good a consideration as the forbearing to seek it.

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Gifford, contra :

This is a promise to pay the debt of another; it is, in the language of the statute, "to answer for the debt, default, or miscarriage of another;" therefore, there must be an agreement in writing.† The distinction taken by the plaintiff cannot hold, because every promise to answer for the debt of another is a new contract, yet is it within the statute, for it is expressly declared to be so; and as to the other branch of the position, there was not any original consideration, if by that term is meant a consideration moving to the defendants' benefit, so as to make this a promise on their own account. In *Read v. Nash*, the defendant was, in the strict sense of the expression, the original contractor; for there was not any debt owing to the plaintiff from any third person at the time when the promise was made, and the judgment proceeded on this distinction. So in *Williams v. Leper*, according to the report in *Wilson*, the defendant had an interest in the goods, for a bill of sale had been made to him; wherefore the Court, with the exception of *Aston, J.*, say, "This is not a promise for the debt of another, the goods were debtor, and the defendant was in nature of a bailiff for the *landlord, and if he had sold them and received the money, money had and received for the plaintiff's use would have lain. The defendant had an interest, and the plaintiff gave up his right to distrain." Having waived a right in respect of which the defendant was personally interested, the plaintiff in that case might well be considered as entitled to treat the defendant's promise as a new contract upon a good consideration moving to him. How different is the present; here the defendants had no interest in the goods, a bill of sale had not been made to them; one of them, indeed, was to sell the goods, but it does not appear that either of them

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† See *Wain v. Warlters*, 7 B. R. 645 (5 East, 10; 1 Smith, 299).

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was to derive advantage from the proceeds; on the contrary, the goods were to be sold for the tenant; so that the consideration of the promise was exclusively moving to him. And although it may be true that the plaintiff was induced to forego a right which he then held, yet that circumstance alone has never been considered sufficient to avoid the statute; for if it had, the decision in *Chater v. Beckett*† must have been the other way, because the plaintiff in that case staid proceedings on a *ca. sa.* In *Houlditch v. Milne*, Lord ELDON considered the possession and use of the thing as the material point. “If (said he) a person got goods into his possession on which the landlord had a right to distrain for rent, and he promised to pay the rent, though it was clearly the debt of another, yet a note in writing was not necessary.‡ And LE BLANC, J., in *Castling v. Aubert*,§ holds similar language,—“this is a case in which one man having a fund adequate to the discharge of incumbrances, another man undertook that if that fund were *delivered up to him, he would take it with the incumbrances.” Now nothing of this applies to a case where the goods were only delivered to the defendants for the use of the tenant, he remaining still liable to the debt, and it being his debt, as the paper writing imports, for which the defendants undertook. Money had and received would not have lain against them as in *Castling v. Aubert*.”

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LORD ELLENBOROUGH, Ch. J.:

Perhaps this case might be distinguishable from that of *Williams v. Leper*, if the goods distrained had not been delivered up to the defendants. But here was a delivery to them in trust, in effect, to raise by sale of the goods sufficient to satisfy the plaintiff's demand; the goods were put into their possession subject to this trust. So that in substance this was an undertaking by the defendants that the fund should be available for the purpose of liquidating the arrears of rent. There was, therefore, a consideration for this promise partly falling within the authority of *Williams v. Leper*, partly within that of *Read v. Nash*.

† 4 R. R. 418 (7 T. R. 201).

‡ 6 R. R. 815 (3 Esp. 87).

§ 2 East, 332.

|| See *per* Lord ELLENBOROUGH, 2 East, at p. 330.

BAYLEY, J. :

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I think that the case of *Williams v. Leper* goes the whole length of deciding this case; and that in one particular it is stronger than that case; because in that a distress had not been made, here the plaintiff had the distress in his hands. It is only necessary to attend to the facts in order to see that this case is not within the statute. After the plaintiff had distrained, he held in his own hands his remedy for recovering the rent, and the tenant was at that time no longer indebted; for *so long as the landlord held the goods under distress the debt due from the tenant was suspended. What, then, I would ask, is the substance of this contract? It is as if the defendants had proposed to the plaintiff in these words; you must convert the goods into money in order to satisfy yourself the arrears due, if you will allow us to do this we will pay you. And what would this have been but an independent contract between these parties? I think that the present case is neither within the letter nor mischief of the Act of Parliament, which was aimed at cases where a debt being due from one person, another engaged to pay it for him. But here, for the reason above stated, at the time when the promise was made, the debt was not owing from the tenant.

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ABBOTT, J. :

I am unable to distinguish this case in principle from *Williams v. Leper*, and I find that case was recognized in *Houlditch v. Milne* and *Castling v. Aubert*. I think that this is not a promise to answer the debt of another.

HOLROYD, J. :

I am of the same opinion. If debt were brought for the arrears while the goods were under distress, the tenant might plead the distress in answer, which shews that the debt was for the time suspended. The consideration for this promise was a fresh consideration, not merely moving to the tenant, but to those who made the promise to pay a debt which at that time did not exist as the debt of another.

Judgment for the plaintiff.

1817.
May 13.

MARTIN v. BELL AND ANOTHER (SHERIFF OF MIDDLESEX.)

(6 M. & S. 220—226.)

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The table of fees prescribed by stat. 32 Geo. II. c. 28, s. 12,[†] does not apply to the sheriff's fee for an arrest; and if he take a greater fee than by law allowed, debt lies on the statute for the penalty of 50*l.*, and the evidence of what the law allows is, what, upon taxation by the master, it is the practice to allow.

DEBT for a penalty of 50*l.* upon stat. 32 Geo. II. c. 28, ss. 1, 12. The declaration alleged the issuing of an alias bill of Middlesex against the plaintiff, at the suit of one W. E., indorsed for bail for 1,546*l.* 10*s.*; the delivery of the writ to the defendants, and the plaintiff's arrest thereon; and that while he remained in their custody by virtue of the said process, the defendants took and received of the plaintiff 15*l.* 15*s.* for detaining the plaintiff until he had given bail; which sum was and is a greater sum than at the time was by law allowed to be taken on that occasion, whereby, &c. The defendants pleaded *nil debent*. At the trial before Lord Ellenborough, Ch. J. at the sittings after Michaelmas, 1816, the plaintiff had a verdict, subject to the opinion of the Court on the following case:—

The plaintiff was at six o'clock in the evening of the 3rd of June, 1816, arrested by a bailiff, acting under a warrant issued by the defendants upon the precept stated in the declaration, and carried to a lock-up house, where he continued in custody till three or four o'clock in the afternoon of the following day. About ten o'clock in the forenoon of that day the plaintiff proposed two gentlemen to the officer as his bail, and the officer sent one of his followers to make enquiry into their sufficiency, which enquiry proved satisfactory; but as the person sent to make such enquiry did not *return till three o'clock, one of the gentlemen would, as the plaintiff supposed from his knowledge of his general habits, have left town for his residence in the country, and it would therefore be impossible to get the bail-bond executed by him that night; and it being of consequence

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[†] See now Sheriffs Act, 1889, 50 & 51 Vict. c. 55, s. 29 (2). The expression is, "takes any money," &c. "other than the fees or sums allowed by or in pursuance of this or any other Act." The Act of Geo. II.

was expressed—"other or greater fee . . . than what shall be mentioned or allowed in the list or table of fees which is or shall be settled, inrolled," &c., according to the Act. —R. C.

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to the plaintiff to be released in time to leave town by the mail that evening on urgent business, it was proposed by the plaintiff's attorney that he and another person, a friend of the plaintiff, then present (not one of those originally proposed), should execute a bail-bond, in order to procure the plaintiff's immediate release; but that upon the execution and delivery to the officer of another bail-bond executed by the gentlemen first named, and whose security the officer had agreed to take, the bail-bond to be given by the plaintiff's attorney and the other person then present should be delivered up and cancelled. To this arrangement the officer consented, and two bail-bonds were then executed by the plaintiff, one of which was also executed by the plaintiff's attorney and his friend who was present, and the other was filled up with the names of the two bail originally proposed, and was afterwards duly executed by them, and delivered to the officer, but the first bond was not delivered up or cancelled, as had been agreed. Upon the execution of these bonds by the plaintiff in the afternoon of the 4th, and previously to his release, the officer demanded and took from him 15*l.* 15*s.*, and he was then set at liberty.

The plaintiff's attorney stated in evidence that within his experience the sum allowed by the Master on the taxation of costs, as paid to the sheriff or officer for his fee, is one guinea. But no table of fees settled, enrolled, and registered according to the direction of *32 Geo. II. c. 28, s. 12, was given in evidence; nor was it proved what sum the bailiff was allowed by law on making an arrest, and taking a bail-bond, otherwise than as above stated.

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If the Court shall be of opinion that the plaintiff is entitled, the verdict is to stand; otherwise a nonsuit is to be entered.

The principal point discussed in argument was upon the objection taken that a table of fees ought to have been given in evidence, and that it was incumbent on the plaintiff to prove what sum the sheriff was lawfully entitled to receive for making the arrest and taking the bail-bond in question.

Ross, for the plaintiff, argued that the table of fees mentioned in the stat. 32 Geo. II. c. 28, s. 12, applied only to gaol fees, and not to fees taken by the sheriff, and that the plaintiff

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was not bound to give farther proof than that which was offered of what was allowed by law to the sheriff in the present case. The statute, as appears by the preamble, was passed to restrain the oppression of inferior officers in the execution of process for debt, and the exaction of gaolers to whom such debtors are committed; and it prohibits any sheriff, under-sheriff, bailiff, serjeant-at-mace, or other officer, from demanding or taking any greater sum than is by law allowed for any arrest, &c. By section 5, tables of fees for the gaols in the city of London and counties of Middlesex and Surrey are directed to be settled in manner therein mentioned; and by section 12, no gaoler or other person belonging to the gaol shall demand or take of any prisoner for debt any other or greater fee than what shall be mentioned in the table of fees; and any sheriff, *under-sheriff, bailiff, gaoler, or other officer, who shall offend against this Act shall, over and above the penalties now in force, forfeit 50*l*. It is plain, therefore, from this summary of the Act that the sheriff may offend, and thereby incur the penalty, by taking a greater fee than by law allowed, but not by taking a greater fee than mentioned in a table of fees, because no table is prescribed so far as regards the sheriff. With respect to the term "allowed by law," that must mean the usual fee allowed by the practice of the Court upon taxation of costs, which, according to *Boldero v. Mosse*,† is one guinea; or the sum allowed to the sheriff on arrest by stat. 23 Hen. VI. c. 9; though this latter statute does not seem to have been acted upon in modern days.‡ As to the case of *Jaques v. Whitcomb*,§ it was only a ruling at Nisi Prius; and *George v. Perring* || seems to differ.

Holt, contra, referred to the eleventh section as giving a summary remedy to the party grieved by petition against all persons, whether gaolers or others, employed in the execution of process, for extortion; whence he inferred that the other parts of the Act were intended to be co-extensive. And he said that before the stat. 23 Hen. VI. c. 9, the sheriff was not entitled to any fee upon an arrest;¶ but, on the other hand, he was not

† 3 T. R. 417.

‡ *Martin v. Slade*, 2 Bos. & P. (N. R.) 59.

§ 1 Esp. 361.

|| 4 Esp. 63.

¶ Co. Lit. 368 b.

obliged to bail a defendant arrested on mesne process, though he might have taken bail of his own accord. To remedy this oppression of the subject, that statute was passed, compelling him to take bail, and in return allowing him a fee, viz. 20*d.* for a bail-bond, and 4*d.* for *an arrest. And thus stood the law, so far as regards any statutable enactment respecting his fees, until the statute in question, which, being highly remedial, restrains the sheriff from taking more than by law allowed; and as a criterion by which to judge of what the law allows, it prescribes a table of fees. But if there be no such table, neither will an action like the present lie against the sheriff, as was ruled in *Jaques v. Whitcomb*; and in *Martin v. Slade* it was adjudged that it was incumbent on the plaintiff to shew what was the sum allowed by law.

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LORD ELLENBOROUGH, Ch. J.:

Is not the allowance by the officer of the Court, upon the taxation of costs which is uniformly made, *prima facie* evidence of what is allowed by law? The allowance of the Master is virtually the allowance of the Court; and what the Court has sanctioned by its uniform practice may not improperly be deemed an allowance by law. There is not any table of fees applicable to the present case, nor can we distinctly collect, though we may suspect that it was intended to regulate the amount of fee to be taken by the sheriff on arrest, that the Legislature intended to regulate it by a table. That is the mode prescribed with respect to gaolers; but as to other officers a method has obtained of allowing on taxation a particular sum, which is the allowance of the Court; and surely this is an allowance by law.

BAYLEY, J.:

The tables of fees spoken of in the Act were intended to regulate the fees of the gaoler and officers within the gaol; the twelfth section restrains them from taking a greater fee than is set down in the table; *and it concludes with a general enactment comprehending the sheriff, bailiff, as well as gaoler and other officer, and all offences against the Act, and ordaining a penalty for offending against the same.

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ABBOTT, J. :

I am of the same opinion. The first clause of the Act provides that the sheriff shall not demand or take a greater sum for an arrest than is allowed by law; which is a very general expression, and large enough to comprehend any legal mode of allowance. It is contended, however, that this expression is to be confined to one specific mode of allowance, namely, that pointed out in the fifth and sixth sections; but upon reading those sections it does not appear to me that it ought to be so confined. And I cannot help thinking that the table of fees which was made about the time of passing the Act would have included fees of the sheriff and other officers for arrest, if they had been considered within the Act. When *Boldero v. Mosse* was before the Court, it was held that the table of fees did not apply to arrest; that indeed was a table of fees settled by the magistrates at the county sessions, nevertheless the same rule must be applicable to all other tables of fees. I think, therefore, that the plaintiff is entitled to recover notwithstanding Lord KENYON's opinion in *Jaques v. Whitcomb*. In *Martin v. Slade* there was no evidence of what was the usual fee for arrest farther than what was allowed by the officer of the Court on taxation. The same was proved in this case, and that seems to me to be an allowance by law.

HOLROYD, J. :

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I think the first clause of the Act is independent of the fifth clause, which relates to the fees *of gaolers. The first clause enacts that no sheriff, under-sheriff, bailiff, serjeant-at-mace, or other officer or minister shall demand or take a greater sum than is by law allowed for any arrest. This clause, therefore, assumes that there was some recognized sum allowed by law for an arrest at the time of the Act, for it prohibits the taking a greater sum. And the twelfth clause imposes the penalty of 50*l.* generally upon persons who shall in anywise offend against the Acts. The fifth clause is a prospective one, looking to a table of fees thereafter to be established. Now, before any table of fees was established under that clause, supposing a gaoler to have taken a greater sum for his fee than allowed by law, he would, as I

apprehend, have come within the prohibition of the first clause, and have incurred the penalty in the twelfth clause. I think the case of *Boldero v. Mosse* decisive upon the point, because that case limited the fifth clause to the case of gaolers, and I think that was a right decision.

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Judgment for the plaintiff.

PARKER AND OTHERS, ASSIGNEES OF PENFOLD AND
ANOTHER, BANKRUPTS v. G. F. WISE.†

(6 M. & S. 239—251.)

1817.
May 13.

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Bond by defendant as surety for W. and W., with a condition, reciting that obligees were bankers, and W. and W. paper manufacturers, who had overdrawn their account with obligees 4,822*l.*, and in order to enable them to carry on their business, had applied to obligees to allow them for a time to overdraw such farther sums as they should require, so as that the same, together with the 4,822*l.*, should not exceed in the whole at any one time 5,000*l.*, which obligees had agreed to do, and the condition was for the payment by W. and W. and defendant, or any of them, of the sum of 4,822*l.*, and also such farther sums as obligees should or might thereafter advance to W. and W. in the course of their business, not exceeding in the whole 5,000*l.*: Held, not to be avoided by the obligees having allowed W. and W. to overdraw to an amount, together with the 4,822*l.* exceeding 5,000*l.*, and, therefore, defendant's plea to that effect was ill pleaded; for the restrictive words in the recital were not to be construed as conditional, that if obligees exceeded the amount the bond should be void.

Plea, that after the making of the bond, the partnership of obligees was dissolved, and a new partnership formed, by the retiring of one of the old partners and admitting a new partner, with which new partnership W. and W., with the privity of the retired partner, kept an account, and that at the time of the dissolution of partnership, a balance of 5,000*l.* was due from W. and W. to the partnership for such over-drawing, but the partnership did not at any time demand payment of it, but, on the contrary, at and after the dissolution, discharged W. and W. from making such payment, and consented that the balance should be, and it was, transferred to the account between W. and W. and the new partnership, and became incorporated in their account: Held, that the plea was ill, for an assignment of a chose in action is no discharge of an obligation.

DEBT on bond dated 13th December, 1811, made by the defendant to Parker and the bankrupts in the sum of 10,000*l.*

† Cited and followed in the judgments of MONTAGUE SMITH, J. and BRETT, J. in *Laurie v. Scholefield* (1869) L. R. 4 C. P. 622, 38 L. J. C. P. 290.—R. C.

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The defendant craves oyer, and the condition recites that Parker and the bankrupts carried on the business of bankers in partnership, and one S. Wise and one C. Wise carried on the business of paper manufacturers, and in the carrying on of their said business kept an account with Parker and the bankrupts, and in the course of their said business had overdrawn their account, and were indebted to Parker and the bankrupts in the sum of 4,822*l.* 15*s.* 9*d.* ; and in order to enable them the better to carry on their said business, had applied to and requested Parker and the bankrupts to allow them to overdraw their said account at any time, and from time to time, such farther sums as they should or might require, so as that the same *sums, together with the said sum of 4,822*l.* 15*s.* 9*d.*, should not exceed in the whole at any one time the sum of 5,000*l.*, which Parker and the bankrupts, in order to accommodate them, had consented and agreed to do, upon being indemnified by the obligation above written, but subject, nevertheless, to the condition hereinafter contained. And the condition was for the payment by S. Wise, C. Wise, J. Wise, and the defendant, or any of them on demand, to Parker and the bankrupts, or any of them, of the sum of 4,822*l.* 15*s.* 9*d.* so due to them, and also such farther sum and sums as Parker and the bankrupts should or might thereafter advance to S. Wise and C. Wise in the course of their business, not exceeding in the whole 5,000*l.*

The defendant pleads, that he ought not to be charged by reason of the bond, because, after the making of it, and whilst S. Wise and C. Wise kept such account, and banked with Parker and the bankrupts, to wit, on, &c., and on divers days, &c., Parker and the bankrupts allowed them to overdraw their account to such an amount that the farther sums required of Parker and the bankrupts, together with the said sum of 4,822*l.* 15*s.* 9*d.* so overdrawn, as in the condition mentioned, exceeded in the whole at one time 5,000*l.*, contrary to the said condition.

The defendant also pleads, that after the making of the bond, the partnership of Parker and the bankrupts was dissolved, and a new partnership was entered into, wherein the bankrupts and one W. M. Pinfold were the partners, and from that time carried

on the business of the bank until the bankruptcy of the said bankrupts, with which partnership, during all that time, S. Wise and C. Wise, with the privity of Parker, kept an account. *And that before and at the time of the dissolution of the said partnership, there was due and owing from S. Wise and C. Wise to the said partnership, for such overdrawing of their said account, a large balance, to wit, the sum of 5,000*l.*; but Parker and the bankrupts did not at any time before, or at, or after such dissolution, demand payment to be made to them of such balance, or any part thereof, but on the contrary, at and after the time of such dissolution, to wit, on, &c., discharged S. Wise and C. Wise from making such payment, and then and there consented and agreed that the said balance should be, and the same then and there accordingly was transferred to the account between S. Wise and C. Wise and the said new partnership, and thereby became and was, and thenceforth continued to be incorporated with and part of the last mentioned account. Demurrer to these pleas.

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Chitty, in support of the demurrer, as to the first plea, argued, that in order to sustain the plea, the argument must go this length, that because in the recital a limited advance of 5,000*l.* was contemplated, therefore the obligor was discharged from his liability if the advance should happen to exceed that amount by the smallest fraction. Such a construction, however, of this obligation, independently of the hardship which it would work, was not the natural one. * * But whatever may be the construction of the limitation in the recital, the condition creates an expanded liability, because it is for the payment of 4,822*l.* 15*s.* 9*d.* absolutely, and such farther advances as should be made not exceeding 5,000*l.*; so that the condition has no restriction as to the amount of advances, but only as to the extent of liability. And it has been held that the recital in the condition of an indemnity bond does not confine the liability of the sureties if the condition be not restrictive,† and that though the indemnity be limited as it regards the sureties, there is nothing against equity in making farther advances.‡ * * *

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† *Ex parte Rushforth*, 8 R. R. 10
(10 Ves. 409, 422).

‡ *Paley v. Field*, 8 R. R. 349 (12
Ves. 435).

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The last plea is ill, because supposing accord and satisfaction could be well pleaded in bar to this action, here is accord without satisfaction. * * It has been held that a bill of exchange given for payment and in satisfaction of a debt secured by covenant, cannot be pleaded in bar to an action on the covenant, although judgment be recovered on the bill, if the judgment be unproductive.† So an acceptance of a statute staple for a debt due on bond is no merger of the bond, though of a higher nature.‡ And if a party stipulate by deed to do a particular thing, and begin it within a time certain, or to do a thing on a day certain, he cannot in the one case aver performance by alleging that the time was enlarged by parol, and he performed it within the enlarged time;§ or in the other excuse the performance by averring that it was agreed by parol that he should do something else, and he was thereby prevented from beginning the particular thing within time.|| The utmost that this plea amounts to is, that there was a transfer by parol of a debt secured by bond; which, however it may raise an equity, is still but a chose in action, and cannot go in discharge of the obligation.

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Richardson, contra :

* * The surety was discharged from his obligation by the over-advance. From the period of the decision of *Lord Arlington v. Merricke*,¶ down to that of *Hassell v. Long*,†† it has been considered as an established rule of construction, that the words of the condition shall be qualified by the recital, which is a proper key to the meaning of them. Therefore, though the condition be larger, the Court will measure its extent by the recital.‡‡ If then, coupling the condition and recital together, the intention of these parties is to be collected from the whole context, it would seem that the most reasonable exposition of their intention is this, that they contemplated a limited course of dealing not to exceed 5,000*l*. * *

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As to the last plea, he argued that the same intendment is to be

† *Drake v. Mitchell*, 7 R. B. 449
(3 East, 251).

‡ *Branthwait v. Cornwallleys*, cited
in *Higgin's case*, 6 Co. Rep. 44 b.

§ *Littler v. Holland*, 3 T. B. 590.

|| *Goodwin v. Crowle*, Cowp. 357.

¶ 2 Saund. 411.

†† 2 M. & S. 363.

‡‡ *Pearsall v. Summersett*, 4 Taunt.
593.

made on a general demurrer as after verdict, because the demurrer admits the facts of the plea as fully as if they had been traversed and found by verdict. As, therefore, it is pleaded that the plaintiffs discharged the principal from making payment, and as after the traverse of that fact and verdict for the defendant, it would have been intended that the discharge was effected with all requisite formalities, for otherwise the jury could not have found it a discharge; so shall it be intended upon the present occasion, for otherwise it could not have been pleaded as a discharge, which the plaintiffs by the demurrer have in fact admitted it to be. Or considering this plea in another light, it is not without authority to sustain it; for it has been adjudged, that if A. be indebted to B. in 100*l.*, and B. be indebted to C. in 50*l.*, if B. promise A. to discharge him of so much of his debt as amounts to B.'s debt to C., this will be a good consideration for a promise by A. to pay C. the debt due to him from B.†

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LORD ELLENBOROUGH, Ch. J.:

This is an action on a bond, and the condition of it recites that the plaintiffs carried on the business of bankers, and two persons of *the name of Wise that of paper-manufacturers, and that the latter in carrying on their business kept an account with the plaintiffs, which they had overdrawn to a certain amount; and in order to enable them to go on with their business, had applied to the plaintiffs to allow them to overdraw at any time such farther sums as they should require, so that these farther sums, together with the amount overdrawn, should not exceed at any one time 5,000*l.* Such is the account given in the outset of the recital of this condition, which professes to state, and is confined to the statement of the application made on the part of the paper-manufacturers to their bankers to permit them to overdraw. It is as if in common parlance they had said to their bankers, we owe you a certain sum, suffer us to overdraw farther, so that the sum owing and the sums to be farther drawn shall not exceed 5,000*l.* To this, according to the statement as it proceeds in the recital, the bankers agree on being indemnified

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† Goldsb. 49.

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by the obligation now in suit, subject to the condition that the principals or surety shall pay to them the sum owing, and such farther sums as they should thereafter advance to the principals, not exceeding in the whole 5,000*l*. The recital, therefore, in the first instance, propounds the request of the manufacturers to their bankers, who in making it profess that they do not desire to extend their request beyond 5,000*l*. That is the limit of their request. The indemnity conforming itself to this limit is made to extend to farther advances not exceeding, with those already made, 5,000*l*. And this I take to have been the intention, as it is the contract of the parties. Had the surety, as it has been argued, intended to impose a condition on his part that the bankers should not advance beyond 5,000*l*., in order *to make sure that the manufacturers should not by an indefinite supply of funds be led into a more extensive course of dealing than he contemplated, it would have been easy to have provided for such a condition, by stipulating that the obligation should be void if any farther advance were made. But we do not find any such provision, and the proposition made and accepted, as set forth in the recital, does not of itself preclude the bankers from going farther in their advances, although the condition protects the surety from being answerable for any farther. I adopt to their full extent the positions on which the learned counsel rests his argument in support of this plea, that a surety ought not to be bound beyond the scope of his engagement, and that this is to be sought out from the whole context taken together, and that the decisions from *Lord Arlington v. Merricke* to the last case cited agree that the condition shall be taken with reference to the recital, and may be explained and restrained by it. But all this imports that it is to be gathered from the recital that the intention of the parties requires the condition should be qualified. In the present case, I consider the proposal made and agreed to as differing in its extent from the indemnity intended to be given; for it might well be, as between the bankers and their customers, that the latter should ask, and, therefore, be in a situation to demand only a limited advance, and yet that it should be in the breast of the bankers to go farther if they pleased, and that the surety might be content to pledge his security to a limited extent

without imposing it as a condition, that if more were advanced he would not be answerable to the amount limited. And as this was a reasonable, and therefore probable engagement, and the surety has made no provision as *it regards himself, to restrain a farther advance, and as such a provision if it had been intended might easily have been introduced, the conclusion I have arrived at is, that it was not intended. I do not, therefore, see any reason for adding this restraint as a proviso to the words of the condition. And this disposes of the first plea. As to the other plea, certainly the transfer by the old firm of the balance due to them from the manufacturers by agreement with the new partnership that it should be transferred to their account, comes within the rule of law which prohibits the transfer of a chose in action. It seems to me then that both these pleas are ill pleaded.

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BAYLEY, J. :

I think that both these pleas are bad. With respect to the first, I agree that in order to find the right construction of the condition, every part of the instrument is to be searched to ascertain what the parties meant. If the true construction be that the parties intended to stipulate against any advance beyond 5,000*l.*, then this advance will have the effect of cutting down the obligation altogether. But the Court ought to see plainly that this was the intention, before they give a construction to the language of this bond which would have the effect of avoiding it, if one shilling beyond the sum named should be advanced. According to the transaction as it is related in the recital, a balance was due to the bankers at the time of entering into this obligation; the parties from whom it was due apply to the bankers for farther advances, which, however, they do not require should exceed 5,000*l.*; the bankers accede to the application, and the bond is entered into, which has for its condition that the obligor, or those *named therein, shall pay the balance already due, and such farther advances as the bankers should make, not exceeding 5,000*l.* The obligor does not pretend that he or the others have paid any part of the balance or farther advances, but excuses himself from so doing by setting up as

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his defence that the bankers had in their advances exceeded 5,000*l.*, and thereby vacated the obligation. But if the parties had intended to attach a consequence so penal to an advance beyond that sum, can it be supposed that they would have contented themselves with language so equivocal, and would not have introduced express words of condition, as it were by way of caution, that such should be the effect? I think it hardly possible that they could. As the obligation stands, it seems to me that its true import is no more than this, that the parties asked for a farther advance not exceeding 5,000*l.*; that the bankers agreed to this, and the surety undertook to indemnify them to that extent. As to the other plea, it amounts to nothing more than an assignment of a chose in action, to which it does not appear that the surety assented.

ABBOTT, J.:

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I am also of the same opinion. As the first plea would have it, we ought to construe this obligation in such manner that the defendant would be discharged from it, if any sum, however small, were advanced beyond the sum of 5,000*l.* Looking at the language of the condition, I am unable to find in it any expression to that effect; indeed it is not pretended that there is; but it is said that this is to be found in the recital. Now I agree, that if there be anything in the recital from which we can collect that the parties intended to carry the limitation to the extent argued, our *construction must be accordingly; but the language of the recital, as it regards any express prohibition against a farther advance, is, to say the least of it, extremely doubtful, and certainly not sufficiently explicit to control the subsequent words of the condition. On the contrary, looking to the probabilities of the case, it appears to me, that if the proposition made to the bankers had been, that if they permitted the smallest advance beyond 5,000*l.*, the surety should be held discharged, it is highly probable they would have rejected it; because if a slip of this kind were to have the effect of depriving them of the benefit of the security, much of difficulty and inconvenience must have occurred in their dealings with the principal; they could never have ventured to honour a single draft without looking to the

precise state of the account between them. Such a result would have been most inconvenient to the plaintiffs. It is not likely, therefore, that they would have consented to this engagement; wherefore I think it would require clear words of condition, in order to warrant our construction to that effect. It is difficult to say precisely what is meant by the last plea; it has been argued as if it amounted to a release, or, if not, that it is at least a transfer of the debt by assignment to the new firm. The only word which I find in the plea bearing the semblance of a release, is the word "discharged;" this, however, does not necessarily import a release. As to the rest, it is nothing more than an assignment of a chose in action, for which the assignor has still a right of action.

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HOLROYD, J. :

I am also of opinion that the plaintiffs are entitled to recover. It is clear, I think, that the *words of the condition, without reference to those contained in the recital, do not prohibit the making advances beyond 5,000*l.*, so as to extinguish the bond in that event. According to the words of the condition, the obligor stands liable to the extent of 5,000*l.*, and to that extent only, although advances should be made to a greater amount. Then let us consider whether the recital furnishes a different interpretation of the words of the condition. In order to do that it must appear that the ordinary acceptation of the words of condition would be inconsistent with the declared intention in the recital. But advertng to the recital, I think it only shews that an advance to a certain extent having already taken place, a proposition was made to the plaintiffs by the principals, to be allowed to draw upon them farther to an amount, together with the sum already drawn, not exceeding 5,000*l.* The plaintiffs acceded to this proposition, viz. that they would make farther advances to an amount not exceeding that sum, upon being indemnified; and as the obligation states, subject to the condition after mentioned, upon which condition I have already observed. There is an engagement, therefore, on the part of the plaintiffs, to advance as far as 5,000*l.* without any restraint upon their advancing more, but with a condition on the part of the obligor that he

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will be answerable to that extent only. In other words, this was an indemnity to a limited extent, however large the advances might be. This was, as I think, what the parties intended, and it is the result of the natural interpretation of the expressions used in their agreement. As to the last plea, it seems to me to be ill for the reasons already given.

Judgment for the plaintiffs.

1817.
May 14.

THE KING v. HOARE AND OTHERS.

(6 M. & S. 266—270.)

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Indictment for forcible entry, charged that defendants into one messuage, &c. then and there being in the possession of one W. P., he, the said W. P., then and there being also seised thereof, with force and arms, &c. did enter, and the said W. P. from the peaceable possession with force and arms, &c. did put out. After conviction of defendants: Held, that this was a sufficient averment of the present seisin of W. P. to warrant the Court in awarding a writ of restitution.

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THE defendants appeared to receive judgment upon an indictment for a forcible entry and detainer, to which they pleaded not guilty, and were convicted at the Worcestershire Assizes. The indictment charged that the defendants, on, &c. at, &c. into one messuage, &c. situate at, &c. and then and there being in the possession of one Sir William Parker, Bart., he the said Sir *W. P. then and there being also seised thereof, with force and arms, and with a strong hand, unlawfully, riotously, routously, and tumultuously did enter, and him the said Sir W. P. from the peaceable possession of the said messuage, &c. unlawfully and injuriously with force and arms, and with a strong hand, did expel and put out, and him the said Sir W. P. so as aforesaid expelled and put out from the possession of the said messuage, &c. on the same day and year aforesaid, and continually afterwards until the day of taking this inquisition at, &c. unlawfully and injuriously, with force and arms, and with strong hand, did keep out, and still do keep out, and the same messuage, &c. from the day and year first aforesaid, continually hitherto with force and arms, and with strong hand, did hold and detain, and still do hold and detain from the said Sir W. P. to the great

damage, &c. and against the statute, &c. And in another count it was alleged, that the defendants into one other messuage, &c. situate, &c. whereof the said Sir W. P. was then and there seised, and in the possession of the said Sir W. P. then and there being on, &c. with force and arms unlawfully did enter, &c.

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And now *Taunton*, for the Crown, prayed the Court to award restitution; which was opposed by *Jervis*, *Peake*, and *Petit* for the defendants, by reason of the insufficiency of the indictment to warrant the awarding of restitution. For the indictment only alleges that Sir W. P. was seised, without shewing of what estate, whether in fee or for life. And *non constat*, that he might not have been seised *pur autre vie*; in which case if *cestui que vie* has died since the finding, Sir W. P. would not be entitled to restitution. By stats. 5 Ric. II. c. 8, 15 Ric. II. c. 2. and 8 Hen. VI. c. 9, none could have restitution but of the *freehold, but by stat. 21 Jac. I. c. 15, this remedy is extended to terms for years, copyhold, &c. But the indictment ought to be certain, and to shew not only the certainty of the house or land, but also what estate he had in the land when the entry was made.† And though it afterwards say *quod disseisivit*, it is not enough, for that is only an implication of a freehold.‡ So *possessionatus* is held ill to shew a term.§

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BAYLEY, J. : ||

It seems to me that this indictment is sufficient to warrant the Court in awarding a writ of restitution. The averment perhaps is not so technically framed as it might have been, it does not state that the party was seised in fee or as of freehold; and it is objected that as the indictment does not shew of what estate seised, it may be that he was seised of an estate for the life of another who has ceased to live at the present time. But if the indictment had expressly averred that he was seised for the life of T. S., that would have been enough to warrant restitution, because it must have been intended, unless the contrary were shewn, that T. S. was alive. Now the averment in question

† *Rez v. Dorny*, Salk. 260; S. C.

Id. Raym. 610.

‡ See 1 Ventr. 306.

§ See 1 Sid. 102.

|| Lord Ellenborough, Ch. J. had left the Court.

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imports a seisin either in fee or for his own life, or for the life of another : in the two first cases there is no doubt ; in the latter, unless there be something introduced on the record to shew the death of *cestui que vie*, it is good for the reason before given. The rule of law is, that a life in being shall be presumed to continue until the contrary be shewn.

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HOLROYD, J. :

I think a writ of restitution ought to be awarded. The indictment charges, that the defendants entered into a messuage then in the possession of Sir W. Parker, he then being also seised thereof, and forcibly expelled him from the possession, and kept him out until the day of taking the inquisition. It is objected, that there is no averment that Sir W. P. continued seised. Now it is a principle of law, that where an estate or interest passes presently and vests, which is to be defeated by a condition subsequent, or matter *ex post facto*, it shall be deemed to continue, without any averment that the condition or matter *ex post facto* has not happened, for it shall be pleaded by him that would take advantage of the condition or matter *ex post facto*.† It is laid down, however, that if a person claim under one who has only an estate for life, he must aver continuance of the estate ; yet even here, implication that the life continues is sufficient. Therefore in ejectment, and a special verdict found, an exception being taken because the life of the lessor in the action, who was tenant for life, was not found, and so it did not appear that the plaintiff had title, the Court disallowed it, for it shall not be intended that the lessor is dead, unless it had been found.‡ But in this indictment the party does not claim under tenant for life ; and therefore the case falls within the principle above mentioned. Again, in another case, where the defendant made cognisance for rent to a lady who was tenant for life, it was assigned for error that it did not aver that she was alive. [*270] *Sed non allocatur*, for the cognisance being made *in her right, it is sufficiently averred that she was alive, and there is not any precedent of such an averment. It is also necessarily to be

† See *Ughtred's case*, 7 Co. Rep.
10.

‡ *Molineux v. Molineux*, Cro. Jac.
146.

intended upon the issue, which is, *quod est et tempore quo* *Plaint. fuit infra feodum*, &c.; which is a sufficient averment that she was alive at the time of the cognisance, and is necessarily implied in the pleading, as in the case 13 Eliz. in Dyer, *adhuc seisitus*, &c. Wherefore judgment was affirmed.† It appears to me, then, that, even supposing that it were necessary to aver in this indictment a continuance of the life, these authorities would bear it out; because, according to the rule laid down in them, it is implied in the pleading, he being then seised, that the life continued at the time; and the indictment charges that the defendants wrongfully put him out. If the life has ceased since, it should have been shewn by the party who would use it as a reason against the awarding of restitution.

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ABBOTT, J.:

I take no part in this case, because I happened to know a good deal of it while at the Bar; nevertheless, there can be no impropriety in stating that I agree in the law which has been laid down by the Court. If this be not sufficient, it would be impossible ever to award restitution in the case of tenant for his own life, or tenant *pur autre vie*; because it would be impracticable to put any averment on the record which would shew him to be alive at the time when the writ is prayed.

Judgment awarding a writ of restitution.

HATTON v. HOPKINS.

(6 M. & S. 271—273.)

1817.
May 16.

The candle and fire lighter to the yeomen of the guard at St. James's Palace privileged from arrest.

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A RULE *nisi* was obtained for discharging the defendant on common bail, upon an affidavit of the defendant, that in November, 1808, he was appointed (by warrant under the hand of the Lord Steward of the Household) candle and fire lighter to the yeomen of the guard at St. James's Palace; that he was sworn into the office on the 26th November, 1808, and obtained

† *Smith v. Melfer*, Cro. Jac. 637.

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a certificate of his appointment under the seal of the board of green cloth ; † that he had ever since continued to hold the office, and to receive the salary and emoluments of it ; and that the duties consisted in lighting and attending the candles and fires kept in the state guard-room at St. James's Palace, which fires were kept in night and day, and the candles at night ; and that he had frequently performed the duties of the office in person during the time he had so held it, and prior to his arrest. An affidavit of the plaintiff's attorney in answer was now produced, stating that, upon enquiry at the pay-office of the Lord Steward, he was informed the *office was one the duties of which were not required to be performed in person ; that they did not know of any deputy or other person being appointed to execute the same instead of the defendant ; that defendant was only known there by his name, and by the orders in writing which he gave every quarter for the receipt of the emoluments of the office ; that he, deponent, could not learn from any person that the duties of the office had ever been executed by the defendant ; that the business of the defendant was that of a painter ; that he resided constantly at Windsor, and had not any other place of residence ; that the debt for which he had been arrested was for the balance of two promissory notes for goods sold to him in the way of his business.

Gaselee shewed cause, and contended that the only authority for allowing the privilege was where the party was in the actual execution of the duties, or where a personal attendance on the King was required. Therefore the coachman in ordinary to his Majesty, ‡ who was liable to be called on daily to drive his carriage, and the junior clerk of the King's kitchen, § were held

† The certificate, a copy of which was set forth in the affidavit, was as follows:—

"These are to certify whom it may concern, that the bearer hereof, William Hopkins, was this day sworn and admitted into the place of candle and fire lighter to the yeomen of the guard. By virtue whereof he is to have and enjoy the salary

and allowances, and all the privileges and advantages thereunto belonging. Given at his Majesty's Board of Green Cloth, St. James's, this 26th day of November, 1803, in the forty-fourth year of his Majesty's reign.

"G. STONE."

‡ *R. v. Foster*, 11 R. R. 546 (2 Taunt. 167).

§ *Bartlett v. Hebbes*, 5 T. R. 686.

entitled to privilege. So in *Killegrew's* case,† who was a grand officer of the King's household. And this was said to be a privilege for the advantage of the King, but not for his servants. Now the office in question is one which does not regard the King's person, but only the King's yeomen of the guard; to allow the privilege to this defendant, will be to extend it from the servant of the King to the servant of the *King's servant. And it is plain, from his residing twenty-two miles off, that he could not be in the habit of performing the duties in person.

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Marryat, contra: The yeomen are the King's body guard, and, as such, occupy a part of the palace at St. James's, and for the exercise of their duty require, as it is stated, fire and candle by day and night. It is necessary, therefore, that some officer should attend for the purpose of supplying them. If a personal execution of the duties of the office be necessary, which, from the authorities quoted does not seem to be the case, the defendant has complied with this requisite, for he has frequently performed the duties in person; and is known at the pay-office of the Lord Steward as much, probably, as any other warrant-officer, by the drawing his pay.

LORD ELLENBOROUGH, Ch. J.:

Although the defendant is not employed immediately about the King's person, yet is he an officer for those who are so employed. If it had appeared that the defendant had never exercised the functions of his office, I should have inclined against the privilege; but since he has frequently done so, and is liable to be called on again, I think he is entitled.

Per CURIAM:

Rule absolute.

† Sir T. Raym. 152.

1817.
May 16.

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 OTHERS.

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(6 M. & S. 276—277.)

Award, that the sum of 230*l.* is due from defendants to plaintiffs, and that out of said sum defendants should pay to arbitrators 93*l.*, being the expenses of preparing the agreement of reference and their award, and for their charge, trouble, and attendance on the reference and arbitration, and certain costs, which they award to be paid to solicitors of plaintiffs in respect of certain actions mentioned in the agreement of reference, leaving the sum of 136*l.*, which they award to be paid to plaintiffs: Held, that the award was void for uncertainty, in directing a sum in gross to be paid to the arbitrators for the objects above mentioned, without specifying the particular sum to be appropriated to each object.

SUBMISSION to arbitration by the plaintiffs on the one part, and the defendants on the other, reciting differences, and that actions had been commenced by the plaintiffs against the defendants; and it was agreed to refer the same to the award of two persons named as arbitrators, and such third person as they should choose, and that the award of the said arbitrators, or any two of them, should be binding; and that the costs of the said actions so commenced, and the costs and charges of the submission, and of the award to be made in pursuance thereof, and all other expenses occasioned thereby, and of making the submission a rule of Court, should be borne and paid by the said parties, as the arbitrators or any two should, by their award, direct. The arbitrators award that the sum of 230*l.* 8*s.* is due from the defendants to the plaintiffs, and that out of the said sum the defendants should pay to them, the said arbitrators, 93*l.* 12*s.*, being the expenses of preparing the agreement of reference, and their award, and for their charge, trouble, and attendance upon the reference and arbitration, and certain costs and charges which they thereby award to be paid to the solicitors of the plaintiffs in respect of the said actions so commenced as aforesaid, leaving the sum of 136*l.* 15*s.*, the balance of the said sum of 230*l.* 8*s.*, which sum of 136*l.* 15*s.* they award shall be paid by the defendants to the plaintiffs.

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And because of the uncertainty of this award, in directing a

sum in gross to be paid, without specifying in particular what costs the arbitrators allowed for the agreement, for the award, and in the actions respectively, a rule *nisi* was obtained to set the award aside.

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HENDERSON.

Scarlett and *Parke* now shewed cause against the rule, contending that the award was sufficiently certain. It specified the sum total to be paid, and also the sum to be paid out of it, and the purposes to which the latter was to be applied.

But the COURT was of opinion that there would be danger in permitting arbitrators to award a definite sum, of which a part, including an indefinite allowance to themselves, was ordered to be paid to the arbitrators.

Rule absolute.

Campbell was in support of the rule.

JENKINS v. POWER.

(6 M. & S. 282—289.)

1817.
May 19.

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If a policy of assurance be in its language large enough to comprise an illegal adventure, and the assured contemplated an illegal adventure, the underwriter is not entitled to sue for the premium; therefore, where a broker effected a policy with plaintiff, an underwriter on goods on board a Spanish ship at and from New Orleans and Pensacola, both or either, to her port of discharge in the United Kingdom, with a memorandum of receipt of the premium from J. P. (a merchant in London), which policy was on behalf of a Spanish merchant at Vera Cruz, and at the time of effecting it New Orleans belonged to the Americans, who were at war with this country, and Pensacola to the Spaniards, who were neutrals; and the object of the assured was to cover an importation of cotton-wool in Spanish ships, from New Orleans to Great Britain: Held, that the underwriter could not recover from the broker the premium, inasmuch as such adventure from New Orleans with cotton-wool was illegal, and if plaintiff intended to protect it, his subscription was illegal; and if he did not, it was void, and so no consideration.

ASSUMPSIT for premiums of assurance due from the defendant upon divers sums of money subscribed by the plaintiff upon divers policies of insurance as an underwriter, and for money had and received, and upon an account stated. Plea, *non*

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assumpsit. On the trial *before Lord Ellenborough, Ch. J., at the London sittings after last Michaelmas Term, a verdict was found for the plaintiff for 150*l.*, subject to the opinion of the Court upon the following case :—

The plaintiff is an underwriter at Lloyd's Coffee-house, and the defendant a broker there. On the 10th of August, 1813, the plaintiff subscribed a policy "on goods" in the ship *Carmen*, *Proserpina*, *Ceres*, *Fortuna*, or any other Spanish ship or ships ; and the voyage mentioned in the policy was, "at and from New Orleans and Pensacola, both or either, to her port or ports of discharge in the United Kingdom, with liberty to call and unload at Havannah ; with liberty to carry simulated papers, clearances, and bills of lading ; free of American capture and seizure, and the charges of claiming in case of British detention." The sum underwritten by the plaintiff upon this policy was 500*l.* at twenty guineas per cent., to return the whole premium for short interest. On the 25th February, 1814, the plaintiff subscribed another policy on goods in the *Audaz*, or any ship or ships "at and from New Orleans and Pensacola, both or either, to port or ports of discharge in the United Kingdom, with liberty to call, load, and unload at Havannah ; with liberty to carry simulated papers, and clearances, and bills of lading ; free of American capture and seizure, at New Orleans." The sum underwritten upon this policy by the plaintiff was 200*l.*, at the rate of twenty-five guineas per cent., to return the whole premium for short interest. The defendant, in his character of a broker, procured the plaintiff's subscriptions to both these policies, both which contained the usual memorandum, acknowledging the receipt of the premium from Ignatius Palyart, therein described as the

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*assured. These policies were effected by Palyart, a merchant residing in London, for and on behalf of Thomas Menphy, a Spanish merchant, resident at Vera Cruz, in Spanish America. At the time when the policies were effected, New Orleans belonged to the Americans, between whom and this country there was war, and Pensacola to the Spaniards, who were at peace with this country and America. No licence was obtained or applied for from the British Government to legalise either of these adventures. The object of the assured in both instances was to

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cover an importation of cotton-wool in Spanish ships from New Orleans to Great Britain. On board the *Carmen*, one of the ships mentioned in the first policy, a cargo of cotton-wool was shipped at New Orleans for Liverpool, and proceeded to Havannah, where the ship was stranded, and the cargo saved, and sent forward to Liverpool in another ship. The *Audaz*, the ship mentioned in the second policy, was a Spanish vessel, and it was intended to have imported in her a cargo of cotton-wool from New Orleans into Liverpool, but no cargo whatever was loaded.

The question for the opinion of the Court is, whether the plaintiff is entitled to recover either or both of the two sums, viz., the 100 guineas for the premium on the *Carmen*, and the 50 guineas for the premium on the *Audaz*. If the plaintiff is entitled to recover both or either of these sums, the verdict to be entered accordingly; if he is entitled to recover neither, a nonsuit to be entered.

This case was argued on a former day in this Term by *Puller* for the plaintiff, and *Campbell* for the defendant :

For the plaintiff it was argued, that he was entitled to the premiums, upon the ground, that there was nothing upon the face of these policies to indicate an illegal *adventure, or that the assured contemplated one. An adventure in goods at and from New Orleans and Pensacola, on board a Spanish ship, might, at the time of effecting these policies, have been lawfully undertaken. If the *terminus a quo* were Pensacola, there could be no objection to the trading of a neutral from a neutral territory with one of the parties at war; if it were New Orleans, still, consistently with the *jus belli*, a neutral may trade in neutral bottoms from an enemy's country. The utmost that could be required in either of these cases might be, that the assured should have had a licence; the cargo being of that description which is not legalised by 48 Geo. III. c. 153, s. 13.† But the plaintiff, so far as appears by the case, had no knowledge of the nature of the intended cargo, and if he had, might reasonably presume that a licence, if necessary, would be obtained. If the

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† See *Oliverson v. Loughnan*, 4 M. & S. 346.

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policy regard such an adventure as might have been lawfully performed, then is the underwriter, if he be innocent of any unlawful design on the part of the assured, entitled to the premium. This position was carried farther in *Skeene v. Hall*, in C. P. in Hilary Term last; for there, one of the places named in the policy being such as would have made the adventure illegal, in an action by the broker to recover from his principal the premium, it was held that it was not to be presumed that the illegal point would be resorted to, and the plaintiff recovered. So, in *Sewell v. Royal Exchange*,† the Court decided that the homeward voyage was not necessarily an illegal voyage, for that a licence might have been obtained, and so the assured recovered on the policy.

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For the defendant it was argued, that this was an adventure in violation of the 12 Car. II. c. 18, s. 3,‡ and was not legalised by 48 Geo. III. c. 153,‡ nor could be legalised by licence under the powers given by 45 Geo. III. c. 34.§ The Act of 12 Car. II. prohibits the importation into England of any commodities, the growth, production, or manufacture of America, except in ships owned and navigated as therein prescribed. The 48 Geo. III. c. 153 enlarges the right of importation, but does not extend to cotton wool.|| And the 45 Geo. III. c. 34, which empowers the Crown to license the importation of goods in neutral bottoms from America, is confined to countries there belonging to any foreign European sovereign or state, which New Orleans, one of the *termini a quo*, did not belong to. The adventure then being illegal, the policy was void, and there was no consideration for the premium; and being none, this action must fail, because every action for the premium is founded upon the consideration of there being a valid subsisting contract of assurance. And there is no pretence for arguing that the plaintiff was not privy to the vice of this insurance; for the policy was notice that in one alternative (which was the alternative contemplated) this was an adventure on goods, *i.e.*, any goods to be imported in a Spanish bottom from New Orleans to Great Britain. In *Edgar*

† 4 Taunt. 856, 864.

1872.

‡ Repealed 6 Geo. IV. c. 105.

|| *Oliveron v. Loughnan*, 4 M. &

§ Repealed Stat. Law Rev. Act, S. 346; *Pearce v. Cowie*, 4 Camp. 366.

v. *Fowler*,† it was adjudged that an underwriter could not recover from the broker the premium upon a policy declared illegal by statute, although the broker had in his account given him credit for the premium. *Skeene v. Hall* differed from the present in this, that the broker *had paid the premium for his employer, and the policy was valid as it regarded one of the ports of destination; for it was “at or from Liverpool to Halifax or Charleston,” and the goods were shipped to Halifax, the legal port. And in *Sewell v. Royal Exchange* the outward voyage in respect of which the assured recovered was confessedly legal.

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Puller, in reply, distinguished the case of *Edgar v. Fowler*, inasmuch as in that case the policies were known by all the parties to be illegal; whereas he insisted, as before, that no such knowledge existed in this case.

Cur. adv. vult.

LORD ELLENBOROUGH, Ch. J. on this day delivered the judgment of the Court :

This is an action brought by an underwriter against a broker to recover the amount of the premium payable for the plaintiff's subscription to the two policies mentioned in the special case. By the usage in this branch of business, the premium, as between the underwriter and the assured, is considered to have been paid at the time of the subscription: the underwriter acknowledges his receipt of it; and if he does not actually receive it, he accepts the broker for his debtor, and substitutes him for this purpose in the place of the assured.‡ Being thus substituted, the broker has, in an action, the same grounds of defence against the claim for the premium as the assured would have if he had effected the policy in his own person without the intervention of a broker, except in cases wherein the assured may have recovered, or may be entitled to *recover back the premium from the underwriter; and as the present is not a case of that description, an obligation contracted on his part to indemnify the assured, arising out of his,

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† 7 B. R. 433 (3 East, 222).

in *Xenos v. Wickham* (H. L. 1867)

‡ This description of the usage is L. R. 2 H. L. 296, 319, 36 L. J. C. P. cited by Lord CHELMSFORD (L. C.) 313—R. C.

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the plaintiff's, subscription of the policies, must constitute the only consideration upon which the plaintiff can rely. It is unnecessary to decide whether these policies were effected to cover the interest of a British or of a Spanish subject; because taking the interest to be Spanish, as the plaintiff contended, still the general term "goods," which is used to describe the subject of the insurance, will be large enough to cover an importation of goods in contravention of the Navigation Act, 12 Car. II. c. 18, s. 3, the statute 43 Geo. III. c. 153, s. 13, which was referred to in the argument, applying only to certain particular goods therein enumerated. Then the plaintiff's subscription to the policies being the consideration for the demand which he now seeks to recover, and the language of the policies being large enough to comprise an illegal adventure, the consideration will be illegal, unless the voyage really contemplated, and intended to be protected by the policies, was a part only of the whole voyage "at and from New Orleans and Pensacola" therein described, viz. a voyage from Pensacola alone; or unless the particular goods intended to be imported from New Orleans were of the description mentioned in the stat. 43 Geo. III. c. 153, s. 13. And on the part of the underwriter it has been urged that he had a right to consider that one or other of these was the object intended by the assured; because he had a right to consider that the assured did not mean to violate the law. If the subscription to these policies were charged against the underwriter as a crime, this argument might *be plausibly urged in his defence, according to the maxim *verba generalia restringuntur ad habilitatem rei vel personæ*. But the underwriter is not here defending himself against a charge: he is putting forward a claim on his part; and even if the Court could, in the absence of all knowledge of the facts, presume in favour of the underwriter that any thing of this kind was intended, yet the facts proved at the trial, and so brought to the knowledge of the Court, take away all opportunity for presumption, and shew that the adventure really intended by the assured, (and, in respect to one of the policies, actually undertaken), by the shipment of cotton-wool for Liverpool, and not for Ireland, under the provisions of the thirteenth section of 43 Geo. III. c. 153, was an unlawful adventure; and if a loss had

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happened the plaintiff could not have been compelled to perform his engagement, and ought not to have done so. The policies then being large enough to cover an illegal adventure, and an illegal adventure being in fact intended to be covered by them, if the plaintiff really meant to protect that adventure, his subscription was illegal, and, consequently, his present demand being grounded on an illegal consideration, cannot be sustained. If he did not mean to protect that adventure, but supposed that some other and lawful adventure was intended by the assured, then, admitting the subscription to have been an innocent act on his part, there will be no consideration at all to support his present demand. The *postea* therefore must be delivered to the defendant, in order that a

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Nonsuit may be entered.

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(6 M. & S. 290—295.)

1817.

May 9.

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An assured, upon a policy effected in terms sufficiently large to comprehend an illegal adventure, and who intends thereby to cover an illegal adventure, cannot recover back the premium without some formal renunciation of the contract made known to the underwriter before the bringing of the action, although the adventure is never entered upon; therefore, on a policy on goods on board the *Audaz* (a Spanish ship), or any other ship or ships at and from New Orleans and Pensacola to a port in the United Kingdom, Pensacola, at the time of effecting the policy, belonging to Spain, and New Orleans to America; which latter country was at war with this country, but Spain was neutral, and the assured intending by the policy to cover an importation of cotton-wool from New Orleans to Liverpool: Held, that supposing this to be a case in which the assured was at liberty to rescind the contract, yet as he had not given any notice to the underwriter of his intention to do so, he could not maintain an action to recover back the premium, although no cargo was loaded on board the ship named, or any other ship covered by the policy.

ASSUMPSIT for money had and received, money paid, laid out, and expended, and upon an account stated. Plea, *non assumpsit*. At the trial before Lord Ellenborough, Ch. J., at the London sittings after last Michaelmas Term, a verdict was found for the plaintiff, with 78*l.* 15*s.* damages, subject to the opinion of the Court upon the following case:—

The plaintiff is a merchant in London, the defendant an

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underwriter at Lloyd's Coffee-house. On the 25th February, 1814, the plaintiff caused to be effected a policy of insurance on goods on the *Audaz*, or any other ship or ships "at and from New Orleans and Pensacola, both or either, to a port or ports of discharge in the United Kingdom, with liberty to call, load and unload, at Havanna, with liberty to carry simulated papers and clearances, and bills of lading, free of American capture or seizure at New Orleans." The defendant underwrote this policy for 300*l.* at the rate of twenty-five guineas per cent., to return the whole premium for short interest. The policy contained the usual memorandum, acknowledging that the underwriter had received the premium from the said plaintiff therein described as the assured. The policy was effected by the plaintiff for and on behalf of Mr. *Thomas Menphy, a Spanish merchant resident at Vera Cruz, in Spanish America. New Orleans at the time when the policy was effected belonged to the Americans, between whom and this country there was war, and Pensacola to the Spaniards, who were at peace with this country and with America. No licence was obtained or applied for from the British Government to legalize the voyage. The *Audaz* was a Spanish vessel, and when the policy was effected it was intended by the assured to import in her a cargo of cotton-wool from New Orleans into Liverpool, but no cargo was loaded on board her or any other ship covered by the policy.

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The question for the opinion of the Court is, whether the plaintiff is entitled to recover. If so, the verdict is to stand; if not, a nonsuit is to be entered.

This case was argued and determined on a former day immediately after the argument in the preceding case of *Jenkins v. Power*, but is reported in this order for the sake of perspicuity, as much of the present argument referred to what had fallen from the counsel in argument in the preceding case.

Puller argued for the plaintiff, and *Campbell* for the defendant:

For the plaintiff it was said that he was entitled to a return of premium, inasmuch as by this policy an illegal traffic was intended to be covered; but before any inception of the

adventure, and therefore while there was a *locus pœnitentie*, the plaintiff desisted from the project, and so the risk never attached on the defendant. On which distinction, namely, because the risk had attached, the cases of *Lowry v. Bourdieu*,† *Andree v. Fletcher*,‡ **Vandyck v. Hewitt*,§ *Lubbock v. Potts*,|| *Morck v. Abel*,¶ were decided; in the latter of which it was said emphatically by one of the Judges, “If the assured, instead of seeking to recover a total loss, had in the first instance stated to the underwriter that as the cargo was loaded from Calcutta they had no right to recover upon the policy, and therefore sought a return of premium, there might have been some pretence for the claim.” In conformity to this doctrine, in *Oom v. Bruce* † and *Hentig v. Staniforth*‡‡ it was held that the assured was entitled to a return of premium, although the voyage in its inception was illegal. And in *Lacauscade v. White* §§ the plaintiff was allowed to recover back money paid on an illegal consideration, after the event on which it was paid had terminated against him. Perhaps this is hardly to be reconciled with *Howson v. Hancock*,||| and it is not necessary that it should be for the present purpose.

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For the defendant it was argued, that where money is paid by one party to an illegal contract to the other, an action will not lie to recover it back. That the contract in question was illegal, and that the plaintiff was party to the illegality, whatever might be said in favour of the defendant, was expressly stated in the case; for it was he who contemplated by the policy to cover an illegal importation; and, if a comparison were to be made between the two, participated in something beyond the *par delictum*. *Oom v. Bruce* and *Hentig v. Staniforth* admit of this distinction, that, assuming the state of things to have *been as it appeared to the parties at the time of the contract, and as they had a right to assume, having no means of knowing the contrary, the insurance would have been well enough; and

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† Dougl. 467.

‡ 1 R. R. 701 (3 T. R. 266).

§ 5 R. R. 516 (1 East, 96).

|| 7 East, 449.

¶ 3 Bos. & P. 35.

†† 11 R. R. 367 (12 East, 225).

‡‡ 5 M. & S. 122.

§ § 7 T. R. 535.

||| 8 T. R. 575.

PALTYART *Lacausade v. White* was the case of a stake-holder, which
 v.
 LECKIE. perhaps may afford another distinction, and the authority of
 that decision has subsequently been much shaken.†

LORD ELLENBOROUGH, Ch. J. :

I confess, that I wish we had never departed from the plain and intelligible rule, that where the contract is founded upon a consideration clearly illegal, neither party should be allowed a *locus standi*, and to receive any assistance in a court of justice. This is a broad principle which no one could well misapprehend, and we have got into some difficulty by receding from it. However, in the present case, giving the utmost latitude to the doctrine, that there ought to be a *locus pœnitentiæ*, and that the party ought not to be compelled against his will to adhere to the contract, I see nothing to lead me to the conclusion that this party withdrew from the contract; he manifested no such intention before the bringing of the action. It cannot be denied that he stood at least *in pari delicto*, perhaps in a higher degree than the defendant. Under these circumstances, I am unable to understand the ground on which this action is to be maintained. I would add, with reference to the party's withdrawing himself from the contract, that there ought, as it seems to me, to be some notice given of his intention. How is the underwriter to know that the risk *is abandoned? The adventure is not confined to any particular ship; it may be in this, or any other ship or ships. There was no indication in this case of the plaintiff's abandonment, except by bringing the action, which is but a notice by inference.

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BAYLEY, J. :

I agree that this action cannot be maintained, and my opinion rests upon the ground, that no notice was given to the underwriter that the policy was abandoned. If the question were, whether the illegality were of such a nature as that, upon a distinct rescinding of the contract, the assured would be entitled to recover back the

† See *Howson v. Hancock*, and *per* LAWRENCE, J. in *Williams v. Hedley*,
 LE BLANC, J. in *Vandyck v. Hewitt*, 8 East, 382 n.
 5 B. R. 518 (1 East, 98), and *per*

premium, it might, perhaps, be as well to pause, in order to guard against trenching upon any of the cases already decided. But, on the short ground, that here was no notice of an intention to abandon, I think the plaintiff is not entitled to recover.

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ABBOTT, J. :

It is plain that the plaintiff intended to cover an illegal voyage, and that he would now seek to get back the price of his indemnity on that voyage. And the question is, if he be entitled to recover, having never prosecuted the voyage. It has been argued that he has rescinded the contract, and therefore is entitled. As at present impressed, I am strongly inclined to think that he was not at liberty to rescind it, having paid the consideration and completed the contract. But, supposing that it was open to him to make his election and take back his money, it does not appear that he ever exercised that election. In order to do that, I think he should formally have announced his intention.

HOLROYD, J. :

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I am of the same opinion, that this action cannot be maintained. Without determining whether the plaintiff in this case was at liberty to rescind the contract, it is sufficient to say that his right to this action can only stand upon his having rescinded it, and that it does not appear that he did so. This is an assurance on goods on board the *Audaz*, or ship or ships, so that the assured might have loaded on board any ship. It was a fact peculiarly within his own knowledge whether he did so or not. And the rule is, that of facts lying peculiarly within the knowledge of one party, notice must be given by him ; it must be alleged in pleading, and if so, it is equally necessary to prove it.

Judgment for the defendant.

1817.
May 19.

THE KING v. ROBERT ROPER.†

(6 M. & S. 327—339.)

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After verdict of "guilty" on an indictment for perjury in an answer exhibited to a bill filed in the Court of Exchequer, the Court refused to arrest the judgment, on the ground that the answer was intituled as an answer to a bill of the plaintiffs, but varying the Christian name of one of them.

THE defendant was convicted at the last London sittings of perjury, in an answer to a bill filed in the Court of Exchequer. The indictment set forth the exhibiting of the bill in the said Court against the defendant by thirteen complainants, then all underwriters of the city of London (naming them, and among them Francis Cavendish Aberdein); and shewed the matters contained in the said bill as in and by the said bill of complaint of the said complainants (naming them as before), remaining filed as of record in the said Court of Exchequer at Westminster, (among other things) more fully appears. It then averred, that the defendant exhibited and produced his answer to the said bill of the said complainants (naming them as before) intituled "The answer of Robert Roper, the defendant to the bill of complaint of (naming the several complainants, but instead of Francis Cavendish Aberdein, naming him J. C. Aberdein.)" The indictment then went on to aver, in the usual form, the deposing by the defendant, before a Baron of the Exchequer, to the contents of the answer, and to assign the perjuries thereon.

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On a former day in this Term, it was moved in arrest of judgment, by reason of the incongruity apparent on the indictment, which alleged an answer, intituled an answer to a bill filed by J. C. Aberdein to be an answer to a bill filed by Francis Cavendish Aberdein; and it was *urged, that this answer, like an affidavit wrongly intituled, or a plea filed in a wrong name, ought to be treated as a nullity; and, therefore, was incapable of sustaining an assignment of perjury. If the fact were so, it might and ought to have been alleged in the indictment, that

† This case is reported, for the reason that the judgments state some principles of general application. The necessity of stating particulars

of the proceedings in which the perjury arose is removed by 14 & 15 Vict. c. 100, s. 20.—R. C.

Francis Cavendish Aberdein exhibited his bill by the name of J. C. Aberdein, which would have explained the apparent incongruity; but an answer to a bill of J. C. Aberdein can never, while unexplained, be taken to be an answer to a bill filed by F. C. Aberdein. If a variance in the intituling of an answer were allowable in one particular, it might be in a hundred; but this would lead to great uncertainty, and, perhaps, to fraud. And the reason given why an affidavit defectively intituled cannot be read, is, because perjury cannot be assigned upon it; and, therefore, not only the surnames of the parties, but the Christian names also must be truly inserted, otherwise the affidavit is inadmissible.† So, a rule of Court for discharging B. out of custody, intituled, by mistake, in an action A. against B., where the action is against B. and C., is nugatory, although the defendant be only charged in custody in one cause at the suit of A.‡ All which authorities apply with equal force to an answer defectively intituled.

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Gurney and Andrews shewed cause, and argued, that an inference was not properly to be drawn from the answer being intituled an answer to a bill exhibited by J. C. A., that it was not an answer to a bill exhibited by F. C. A., because F. C. A. might well have exhibited his *bill in the name of J. C. A.; and if it had been so averred, such an averment, as it is admitted, would have been unexceptionable. The allegation that F. C. A. exhibited his bill, applied to the person exhibiting it, not to the name in which it was exhibited. The identity of the party is a material allegation, and therefore, it must be presumed, was proved at the trial. And so of the identity of the answer. Whether or not the bill was in his own name or in that of J. C. A., being merely matter of description not affecting the identity, required no proof; for there was nothing inconsistent with its being his bill that it was exhibited in a different Christian name. Although a man cannot lawfully have two Christian names, yet, it often happens, that in practice he varies from his name of baptism. And it would be highly dangerous if a defendant, by misintituling his answer, were allowed to avoid

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† *Fores v. Diemar*, 7 T. R. 661.

‡ *White v. Jones*, 5 East, 292.

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the penal consequences of it, although there should be no doubt of the fact of its being an answer to the particular bill, and it should appear that he has had the full benefit of it as an answer; which appears in this case, by its being averred that the answer still remains as of record.

Knowlys and Lawes, contrà :

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On the principle which governed the decision of *Griffiths v. Wood*,† where it was held, that an answer intituled in the name of Edward, the bill being in the name of Edmund, was no answer, and incapable of being treated as a ground of accusation, this rule must be made absolute. On the same principle, where an indictment for forgery alleged that the bill purported to be directed to one *J. King by the name of J. Ring, the bill being in fact addressed to J. Ring, judgment was arrested; and the reason given was, because the indictment was absurd and repugnant in itself; for the name of one person could not purport to be another.‡ Precision, to a reasonable certainty, is of the very essence of all criminal proceedings, although it be true, as is remarked by high authority,§ that unseemly niceties are to the reproach of the law. Therefore, affidavits in answer to a rule for an attachment, if not intituled, cannot be read, for the party cannot be indicted thereon for perjury;|| and the same doctrine applies to civil proceedings.¶ And if a plaintiff declare against Henry King, otherwise Henry Vaughan King, it is ill, for a man cannot be sued by two Christian names.†† As little can it be allowed to a man to sue by two Christian names; and yet, if an answer to a bill of J. C. Aberdein be treated as an answer to a bill of F. C. Aberdein, it follows, that the plaintiff must have two Christian names. It may be doubted, therefore, whether such an incongruity could have been helped by any averment.

LORD ELLENBOROUGH, Ch. J. :

On looking to this indictment, and considering the argument

† 11 Ves. 62.

‡ *Reading's case*, 2 East, P. C. 981.

§ 2 Hale's P. C. 193.

|| *Bevan v. Bevan*, 3 T. R. 601.

¶ Per Lord KENYON, in *Owen v.*

Hurd, 2 T. R. 644; *Fores v. Diemar*, 7 T. R. 661.

†† *Evans v. King*, Willes, 534; *Moor*, 897; *Cro. Eliz.* 897; *Cro. Jac.* 538; 3 Taunt. 504.

that has been addressed to the Court, I think it must fairly be inferred that the defendant's answer was really an answer to the bill set forth in the indictment, but was wrongly intituled.

*Assuming this to be so, I am by no means of opinion that this mistake is fatal. The indictment expressly avers that this was exhibited as the defendant's answer to the particular bill set forth, and the Court will look with some degree of astuteness in order to prevent a technical objection, arising out of the misintituling of the answer, from defeating the penal effects which properly belong to it. As the misintituling of affidavits has been pressed upon us as an instance in point, it may not be amiss to consider the ground upon which the Court has at different times manifested an anxiety to enforce the due intituling of affidavits. The ground is stated by Mr. Justice DAMPIER, then of counsel in *Fores v. Diemar*, that in the event of an indictment for perjury, it may appear by the affidavit that it was filed in the particular cause without the aid of any extrinsic averment. Now, this imports that, if necessary, it may be supplied by extrinsic averment. In the present case, without depriving some allegation on the record of its due effect, and supposing that some material allegation did not receive its competent proof, how is it that any doubt remains? The indictment alleges that several persons, and among them Francis Cavendish Aberdein, preferred their bill of complaint in the Court of Exchequer against the defendant, which remains filed as of record in the said Court. Therefore, although strictly speaking it is not a record, it is averred that a bill to which Francis Cavendish Aberdein is a party remains *quasi* of record in the Court of Exchequer. The indictment then proceeds to set forth, that the defendant exhibited and produced the answer in writing of him the said defendant, to the aforesaid bill of complaint. Now, giving this allegation its true effect, I must consider the answer as adopting the *bill of complaint in every particular the same, as if it had set forth the bill verbatim. So far then, there is a sufficient identification of the particular bill of complaint, to which the defendant's was an answer. But the indictment goes on to state, that the answer was intituled the answer of the defendant to the bill of complaint of the several complainants, miscalling the complainant, Francis Cavendish

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Aberdein, by the initials of J. C. Aberdein. The objection, therefore, is reduced to this, Whether the intituling of the answer in this way was conclusive of the existence of a suit corresponding with that title, so as to exclude the admission of all evidence to the contrary? If it were not, then there is a finding, and we must take it to be upon sufficient evidence, that the suit to which the answer was put in was not a suit by parties, corresponding with the title of the answer. And if this finding could not be supported, the consequence would be, that a defendant would have it in his power, by misintituling his answer, to defeat the effect of every allegation contained in it. I apprehend, however, that the finding is sufficient, that it is his answer to the bill in question. The only case which gives rise to any difficulty, is that from 11 Ves.† before the Lord Chancellor. In that case the plaintiff treated the answer as a nullity, by moving for a sequestration as for want of an answer, the object of the motion being to bind the defendant by the answer then on the file. The defendant, however, with another view, treated it also as no answer, and desired to be permitted to take it off the file, and tendered another; and the LORD CHANCELLOR acceded to that request. There is, therefore, nothing in the decision which at all affects the present question; but because of some *obiter dicta*, which fell *from the LORD CHANCELLOR in his judgment, to shew that he could not bind the defendant to his first answer, viz. that it was no answer, and that no accusation could be framed upon it, the case is put forward as creating a difficulty upon the present occasion. Now, it is observable, as it regards that case, that there was nothing, as far as appears by the report, but the intituling of the answer to guide the Court: both parties agreed in treating it as no answer, and upon that ground the motion was originated. But in this case there is other matter to connect the bill and answer; and therefore, without interfering even with the *dicta* which fell from the high authority which decided that case, it is enough that it is averred upon this record, and so found by the jury, that this is the answer to the said bill of complaint of the complainants, and among them Francis Cavendish Aberdein. It would be pernicious in its consequence to allow

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† *Griffiths v. Wood*, 11 Ves. 62.

effect to be given to the defendant's own mistake; and although it might have been difficult, under the circumstances stated in the case cited from Chancery, to deal otherwise with the answer, there is no such difficulty in the present case, where, by the aid of other evidence, the variance in the intituling of the answer is cleared up, and shewn to be a misintituling.

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BAYLEY, J. :

I am entirely of the same opinion. I think the decision of this case will not endanger the letting loose of indictments from that precision and strictness which are generally and properly required; nor will it follow, from what passes on this occasion, that an indictment for perjury will be satisfied by any inconvenient generality. On the other hand, the mischief would be monstrous, if, in a case circumstanced as *the present appears on the face of the record, we were to hold that judgment ought to be arrested. It is alleged in the indictment that the defendant put in his answer to the bill as therein set forth, and the bill set forth is a bill filed by Francis Cavendish Aberdein among other complainants, and the record is vouched: "as in and by the said bill of complaint of the said complainants (naming them) remaining of record in the Court of Exchequer at Westminster more fully appears." Therefore the indictment expressly vouches the record as the medium of proof of the existence of such a bill. I cannot agree in the argument, that, because the answer is so intituled, it must be taken to be an answer to a bill filed by J. C. Aberdein; for when I find it distinctly alleged upon the indictment that it was an answer to a bill filed by F. C. Aberdein, which bill is set forth, I cannot say that the intituling of the answer excludes the conclusion of its being an answer to the particular bill set forth. The more natural conclusion seems to be, that the defect is in the intituling, and not in the identity of the answer. If we look to the consequences which might result from a different conclusion, it is obvious that in a multiplicity of suits in equity, in which many complainants join in the same bill, the omitting or varying from any one Christian name, although it might not deprive the defendant of the benefit of an answer, would exempt him from all possibility of being indicted

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for perjury in that answer; nay more, it might have the effect of enabling him to object to any decree being made, because there was no answer. The mischief is more apparent in a case like the present, where the complainants are numerous, if the objection were to hold good; for how easy would it be for a defendant *to put in an answer varying in one of the names in a single letter only, and thereby escape all hazard of an indictment for perjury. It surely would be a most inconvenient result, that the omission of a single letter, if overlooked, although it would not deprive the party of the benefit of his answer, should yet exempt him from all danger in respect of that answer. In the absence of all decisions to that effect, doubtless we ought to pause before we came to a judgment likely to be followed with such inconvenient consequences. The case from 11 Ves. is the only decision which presents any difficulty; but when I turn to the report, it seems to me that the LORD CHANCELLOR could not, upon the facts of that case, come to any other decision than that which he came to. It is true that something like a strong opinion was expressed upon the point now in question; but it may be observed, on this part of the judgment, that it was not necessary to the decision of the case then before the Court. That was an application for a sequestration, on the ground that the defendant had failed to put in an answer,—the object of it being to bind the defendant by a representation made in the answer then put in. The plaintiff, by his application, disclaimed it as an answer; and if he was at liberty to do this, surely it could not be competent to him to insist on binding the defendant to it as an answer, in order to take advantage of it upon another ground: that would have been to blow hot and cold at the same time, and to require the Court to come to an inconsistent conclusion;—therefore the decision of that case does not, as it seems to me, conclude the present. To hold in favour of the defendant on the present occasion, would lead to mischief; and there is not

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ABBOTT, J. :

I am also of opinion, that there is sufficient to warrant the

Court to pass judgment upon this indictment. The indictment commences by alleging, that several persons, and among them Francis Cavendish Aberdein, exhibited their bill of complaint in the Court of Exchequer against the defendant, and it sets forth the bill; which bill appears to relate to a transaction touching the ship *Vigilante*, of which Thomas Gray was master: so that the bill is sufficiently designated by names and circumstances. The indictment goes on to allege, that the defendant appeared in person before one of the Barons of the Exchequer, and then and there exhibited and produced his answer in writing to the aforesaid bill of complaint of the said complainants, naming them; but in setting forth the title of the answer, it miscalls F. C. Aberdein by the name of J. C. Aberdein. The indictment proceeds to charge, that the defendant, intending to aggrieve the said complainants, naming them correctly, deposed concerning the matters contained in the said answer; and it appears by the terms of the answer, as set forth in the indictment, that it relates to and purports to be an answer to the matters set forth in the said bill. The allegation, therefore, in the indictment, that the defendant exhibited his answer as an answer to the particular bill set forth, is clear and distinct; and the indictment vouches the answer as still remaining as of record on the files of the Court of Exchequer. It is objected, however, that inasmuch as the answer, in the intituling of it, varies from the true name of one of the complainants in the bill, the Court, *notwithstanding its entire agreement with the bill in all other respects, is bound to pronounce that it is not an answer to the particular bill; and, certainly, if by reason of this variance, the averment that it is an answer to the bill were like the averment of an impossible or repugnant fact, the Court could not give it effect. But I see no repugnancy in giving effect to this averment, because the answer happens to differ in setting out the name of one of the complainants. It is no more than addressing a man by a wrong name, which may well happen without causing any uncertainty as to the identity of the person intended to be addressed. Then, do we find by any decision in a court of law, that such a variance as this creates a repugnance which cannot be surmounted?—there is not any such case that I am aware of in which any such

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doctrine has been held with reference to an indictment for perjury. The question has arisen upon affidavits made in this Court, which were wrongly intituled, whether they could be received; and the Court has pronounced, that if the affidavit does not pursue the title of the cause, and a court of equity has held the same doctrine with respect to an answer, it cannot be treated as such. And the reason assigned against the admission of such an answer was, because an indictment for perjury would not lie upon it. A better reason, as it appears to me, was given in the other case, viz. that no indictment could be framed upon it without the aid of an extrinsic averment, which the Court ought not to put upon the opposite party to make. Undoubtedly it would be difficult to reconcile with our present decision all that is stated to have fallen from the LORD CHANCELLOR in *Griffiths v. Wood*, unless we understand it in the qualified sense

[*338] above stated. And it is observable, *that the LORD CHANCELLOR remarks, that the plaintiff must either say that it is an answer and keep it, or that it is not an answer; which imports that it was not so entirely a nullity, as not to be capable, at his option, of being dealt with as an answer. It is certainly extremely convenient that the title of the answer should correspond with the bill, and the same as to affidavits, because then the presumption at once arises that they relate to the particular cause. But this presumption is not always a necessary one, for there may be several suits or actions by the same plaintiff against the same defendant; in which case, the affidavit or answer must be applied to the particular bill or action by other evidence than the mere intituling of it, as it would not follow from the correspondence of names that the subject-matter of the suit was the same. By parity of reason in this case, I think the Court is not precluded, by the miscalling of a name, from using its understanding to ascertain whether it be an answer to the bill in question.

HOLROYD, J. :

I am entirely of the same opinion; and as the matter has been so fully gone into, I shall have but little to add. In *Griffiths v. Wood*, the plaintiff proceeded as for want of an answer, by treating it as void, and the LORD CHANCELLOR allowed him so

to do. The answer, therefore, became a nullity by the election of the plaintiff; and then the observation of my LORD CHANCELLOR, that no accusation could be framed upon it, may very likely be correct. For it might be too much, after the plaintiff has chosen to repudiate the answer as being no answer, to allow him to charge the defendant with the penal consequences of having put in a false answer. The question upon the present occasion is, whether the *averment* in the indictment, that the defendant exhibited his answer to the bill of complaint of Francis Cavendish Aberdein, and the other complainants, was established both in fact and in law. It is objected, that the fact could not be established by legal proof that this was an answer to the bill set forth. But it must be recollected that an answer in Chancery is not properly a record; and I see no incongruity in showing *aliunde*, although an answer in the intituling of it varies in the Christian name of one of the plaintiffs who filed the bill, that it is really an answer to the particular bill. If process be taken out against a defendant by a wrong Christian name, and he appear by his right name, the plaintiff may vary from the process and declare against him by the name in which he appears, stating that he was arrested or served with process by the other; which shews, that though a writ be in a wrong name, it may be treated as a writ against the right person. So in the case at Bar, although the answer be intituled as an answer to a bill filed by J. C. Aberdein, nevertheless it may be shewn to be an answer to a bill filed by Francis Cavendish Aberdein.

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Rule discharged.

K. B. TRINITY TERM.

1817.
June 6.

WILSON AND OTHERS v. WOOLFRYES.

(6 M. & S. 341—344.)

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In covenant, the plaintiffs declare, that A., B., C., and D., by indenture, demised to defendant, and made *profert* of the counterpart. Plea, *non est factum*.

After proof of the execution of the counterpart by defendant, it is competent to him to produce the demising part, to shew that only two of the four lessors executed it; and defendant having so done, and thereupon a nonsuit having been directed: Held, that the nonsuit was well.

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COVENANT. The plaintiffs declare, that heretofore and in the lifetime of John Vidler, by indenture between the said Vidler and the said Thomas Wilson the elder, Thomas Wilson the younger, and John Masters, (plaintiffs) of the one part, and the said defendant of the other part,—the counterpart of which said indenture, sealed with the seal of the defendant, the plaintiffs now bring here into Court,—the said Vidler and plaintiffs did, and every of them did demise to the defendant a certain messuage or tenement, &c. ; and the plaintiffs assign for breach the nonpayment of rent. Plea, that the supposed *indenture in the declaration mentioned is not his deed.

At the trial before Lord Ellenborough, Ch. J. the plaintiffs produced the counterpart, executed by the defendant. The defendant put in the original lease, by which it appeared, that only Vidler and Masters were executing parties to the lease ; and thereupon it was objected, that there was a fatal variance between the proof and declaration. And upon this objection his Lordship directed a nonsuit.

A rule *nisi* was obtained to set aside this nonsuit, on two grounds ; first, that it was immaterial upon the present issue whether all the lessors executed the lease : for the defendant was estopped by the counterpart. Secondly, that it was not competent to the defendant, upon *non est factum*, to give the lease in evidence for himself, the counterpart being the only evidence to shew that it was his deed.

[After argument:]

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LORD ELLENBOROUGH, Ch. J.:

The allegation is, that the four demised by indenture, which imports, that they demised by an operative indenture; and this implies both a sealing and delivery by the four. The word "indenture" is *nomen collectivum*, a term comprehending all the parts which constitute the entire deed. According to the passage cited from Littleton,† all the parts form but one deed; it is not strictly an indenture if you omit any of the parts. Now, in the case at Bar, if nothing appeared to the contrary, we might presume from the counterpart, that the demising part of the indenture was duly executed by all the parties named; but the lease having been produced, and the plaintiffs having alleged, that by the indenture the four demised, this must, I think, be received in its technical sense, whether the indenture consist of two or more parts. The question, however, is of some nicety, and the Court is desirous that its judgments should be unanimous; for which purpose, it may be as well that the case should undergo some further consideration: although, I confess, my own mind has remained unchanged from the position in which it stood at the time of the nonsuit.

And now, on this day, being the first day of Term, Lord ELLENBOROUGH, Ch. J. said, that the case had stood over on account of some doubts entertained by BAYLEY, J.; that his Lordship had expressed his opinion at the conclusion of the argument, in which ABBOTT and HOLROYD, Justices, agreed; that it was unnecessary to repeat that opinion, and that BAYLEY, J. now acquiesced, and, consequently, the

Rule for a new trial must be discharged.

† Litt. sect. 370.

1817.
June 18.

THE KING *v.* THE INHABITANTS OF THE
HUNDRED OF OSWESTRY.

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(6 M. & S. 361—366.)

A hundred may be charged by prescription with the reparation of a bridge; and this, although it appears that, by a statute within time of legal memory, one of the townships parcel of the hundred was then annexed to it,

A PRESENTMENT at the quarter sessions against the inhabitants of the hundred of Oswestry, in the county of Salop, for not repairing Llanyblodwell bridge in the said county, was removed, and tried before Park, J., at the last Herefordshire Assizes. The presentment stated that there was and still is a certain bridge called Llanyblodwell bridge, over a certain river, &c., in the parish of Llanyblodwell, in the county of Salop, in the King's highway there, &c.; and that the said bridge was ruinous, &c.; and that the inhabitants of the hundred of Oswestry have, from time whereof the memory of man is not to the contrary, repaired and amended, and have been used to repair and amend the said bridge, and still ought to repair, &c. Plea, not guilty. And it was found against the defendants, subject to the opinion of the Court on the following case:—

Llanyblodwell bridge is situate in the parish of the same name and hundred of Oswestry, in the county of Salop, and crosses the river Tanah, being, as described in the presentment, the King's common highway leading from the town of Oswestry, in the county of Salop, to the village of Llansainfraid, in the county of Montgomery. The hundred of Oswestry, at the present day, consists of sixty-one townships, of which Abertanah is one. Before the time of legal memory, there was a hundred of Oswestry, the local limits of which have always been the same with the exception of the township of Abertanah. *That township was not part of the hundred until the statute 34 & 35 Hen. VIII. c. 26, when it was annexed thereto by virtue of the provision of that statute. Previously to the passing of the stat. 27 Hen. VIII. c. 26, the hundred of Oswestry, with the exception of the township of Abertanah, formed part of the marches of Wales, and was, by the eleventh section of that statute, added to

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the county of Salop; and previously to the passing of the 34 & 35 Hen. VIII. c. 26, the township of Abertanah formed part of the county of Merioneth; but was, by the eighty-seventh section of that Act, annexed to and made parcel of the county of Salop. One end of Llanyblodwell bridge stands in the township of Llanyblodwell, and the other in the township of Abertanah; both being townships in the above-mentioned parish of Llanyblodwell. The hundred of Oswestry, constituted as it is at present (except the town and liberties of the town), is no franchise, but pays county-rates for bridges in the county, and for other purposes, the same as the other hundreds in the county. By several orders of the court of quarter sessions for the county of Salop, of the 8th April, 1684, 9th January, 1699, 3rd May, 1707, 15th January, 1744, 9th January, 1770, 3rd July, 1784, 14th July, 1795, 13th July, 1807, 4th October, 1808, the hundred of Oswestry was ordered to repair the said bridge of Llanyblodwell; and it appears by such orders, that the said bridge has been, in pursuance thereof, from time to time accordingly repaired by the said hundred. At the time of the presentment, and from thence to the present period, the bridge of Llanyblodwell, with 300 feet of the road at each end, has been out of repair as stated in the presentment. The question for the opinion of the Court is, whether the present hundred of Oswestry is liable. *If the Court should be of opinion that it is, the verdict to stand; if otherwise, a verdict to be entered for the defendants.

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Corbett, for the Crown, argued, that the present hundred was liable, and that the inhabitants were properly charged with a prescriptive liability. The hundred, it appears, existed before the time of legal memory; and in various instances, pervading a period of 133 years, has been charged by orders of sessions with the repair, and has in obedience thereto repaired. And as there is not any pretence for suggesting that any individual within the hundred is liable *ratione tenuræ*, it follows that what has been done is attributable only to a prescriptive liability on the hundred. There seems to be no reason why an ancient hundred, like this, should not be charged by prescription as well as a county.

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W. E. Taunton, contra, argued, that in order to charge a hundred with the reparation of a bridge, the charge should be laid specially, and not as here generally, by prescription; and the reason is, because a hundred is a limited district, and therefore not liable in the first instance to such a burden. And the objection to this being done is the stronger in the case at Bar, because one of the townships of this hundred, viz. the township of Abertanah, has become a part of the hundred, and, therefore, the unity of the hundred has been broken, within the time of legal memory; so that it is not possible that prescription should apply to the inhabitants of the hundred as now constituted. Admitting, therefore, that from the numerous instances of repair stated in the case the hundred is chargeable, still the objection *holds that it is not chargeable in the present form. And it would be a hardship on the township of Abertanah, which contributes to the county rates, to hold it also liable to this particular repair, merely because it was annexed at a late period to a hundred which might possibly be liable.

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LORD ELLENBOROUGH, Ch. J. :

If there be any hardship, it is one that results from the express provisions of the statute; which not only contains words of annexation, by which† the town of Abertanah is made part and parcel of the hundred of Oswestry, but directs also that the inhabitants thereof shall do everything with the inhabitants of the hundred, as the same inhabitants do or be bound to do. With respect to the other objection, I would ask whether the allegation does not substantially amount to this: that the hundred of Oswestry, constituted as it anciently was, from time beyond the period of legal memory, had been used and ought to repair, and that since the time of Henry VIII., constituted as it now is, it has been used and ought to repair.

BAYLEY, J. :

Supposing it had been alleged, that the hundred of Oswestry had existed from time immemorial, and that it consisted at different periods of different districts, and that from time

† 34 & 35 Hen. VIII. c. 26, s. 87.

immemorial the hundred had been used and ought to repair: would not such a presentment have been good? Now, the presentment in question does, as it seems to me, amount to the same thing; and this mode of considering it, shews that there *is nothing inconsistent in alleging the existence of a hundred, and its liability from time immemorial, although the entirety of the hundred may not have been uniformly preserved. In my opinion, therefore, this presentment is sufficient.

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ABBOTT, J. :

The statute leaves nothing to inference as to the liability to arise from the annexation; for it enacts expressly, that the inhabitants of the town of Abertanak shall do everything as the inhabitants of the hundred of Oswestry are bound to do.

HOLROYD, J. :

Although the hundred has varied at different times in its component parts, still it may be charged as a hundred immemorially. In the case of a corporation, if it be alleged that the mayor, aldermen, and burgesses have from time immemorial repaired, and it should appear that there was a period when the corporation was not so constituted, this would be bad. In such a case, the proper way would be, to allege that the corporation had immemorially repaired; and then, however constituted the corporate body may have been at different periods, the allegation would be sustained.†

Judgment for the Crown.

† The indictment against the corporation of Kingston for the non-repair of Kingston Bridge, after stating that the bridge was an ancient bridge, and on a public and ancient King's highway, and that part thereof was out of repair, proceeded thus:—"That from time immemorial there hath been, and now is in the town of Kingston-upon-Thames, in the county of Surrey, a certain body politic and corporate of the inhabitants of the same town, called and known from time to time by divers names of incorporation; and that the said body politic and corporate, for divers, to

wit, one hundred years last past, hath been and now is called and known by the name of the 'bailiffs and freemen of the town of Kingston-upon-Thames;' and that the said body politic and corporate, from time whereof *the memory of man is not to the contrary, have repaired and amended, and have used and been accustomed to repair and amend, and of right ought to have repaired and amended, and still of right ought to repair and amend the said bridge when and as often as need and occasion hath been, or shall be or require."

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1817.
June 19.

THE KING v. WOOLER.

(6 M. & S. 366—379; S. C. at Nisi Prius, 2 Stark, 111—115.)

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The affidavits of individual jurors to impugn a verdict recorded, on the ground that it was not given with their assent, are not receivable: but the affidavits of bystanders as to what passed within their knowledge touching the delivery of the verdict and dissent of some of the jury at the time, are admissible; and if the Court see reason to think that some of the jury may not have heard what passed at the time of delivering the verdict by the foreman, they will direct a new trial, and will not, at defendant's request, merely vacate the verdict, in order that it may be tried by the same panel, as if no trial had taken place.

INFORMATION by the *Attorney-General* against the defendant, for printing and publishing a seditious and blasphemous libel. Plea, not guilty. The issue came on for trial before Abbott, J., at the last London sittings, on Thursday, the 5th of June.

At the sitting of the Court on Friday the 6th of June (being the first day in full Term), ABBOTT, J., addressed the Court to the following effect: I take the earliest opportunity of stating to the Court some circumstances which occurred at the trial of a case yesterday before me at Guildhall. The case to which I allude was an information filed by the *Attorney-General* against a person of the name of Thomas Jonathan Wooler, for a libel. After the case had been gone through, the jury retired from the Court to consider their verdict. During their absence, another case was called on, and the trial proceeded, and just as the reply was concluding, the door on my left hand was opened, in order to admit the jury in *Rex v. Wooler*, who returned after considering their verdict; and as soon as the reply in the other case was finished, which was done in one or two sentences. the names of the jurors in *Rex v. Wooler* were called over by the officer of the Court in the usual way, and they were asked, according *to the ordinary course, whether they had agreed in their verdict, and whether the defendant was guilty or not guilty. The foreman answered, that the jury found the defendant guilty; but three of them were desirous, or had desired him on their part, to add something by way of explaining their verdict. I then interposed, and told the jury that I could not receive an opinion or declaration coming from a part

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only of the jury; that the verdict must be the verdict of all; and I asked (speaking, as I thought, in a very distinct and audible tone of voice), whether all the jury had agreed in the verdict they had at first pronounced? the foreman answered, that they had. At that time I did not hear any dissent expressed by any of them. The situation was, however, such, all the jury not having come into my view from the room behind the bench, that it is not altogether impossible that some mistake or misapprehension might have taken place, and that some of the jury might not have heard distinctly what had been said. The jury having retired, and the door by which they entered being closed, I proceeded to sum up the other case. When I had concluded, it was suggested by a gentleman at the Bar, that some of the jury in *Rex v. Wooller* had not concurred, and did not intend to concur, in the general verdict which had been delivered; and were desirous that the verdict should be recorded with some degree of qualification. I have not the precise words very distinctly now in my mind; but I believe I have stated the substance. I was further given to understand that some of the jury were present in or near the Court. I then said, that the verdict of the jury having been recorded after that they had been distinctly asked if they had agreed, and had replied in the affirmative, it seemed to me, that *sitting in that place, I could not do anything in the matter. I do not know whether I made use of the sentiment, but certainly my mind was impressed with it, that it would be extremely dangerous if the Judge, after the jury had retired from the bar, and some interval of time had elapsed, were to receive and act upon any communication from them in the then state of the proceedings. I thought it was too late for me to interfere, and therefore was of opinion that the verdict must stand as recorded. I wish, however, to take the earliest opportunity of stating this occurrence to my Lord and my brothers.

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The learned Judge having concluded, the Court deliberated for some time, when

LORD ELLENBOROUGH, Ch. J. (addressing himself to the *Attorney-General*), said: "The Court cannot, according to the authorities

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and precedents of law, receive an affidavit from a juryman upon the subject of the verdict; but the reason why he is precluded from making such affidavit is, because, under ordinary circumstances, it must be intended that the verdict was given with his assent. But in order to imply his assent, unquestionably it should appear, that he heard what was propounded by the foreman on behalf of himself and his fellows: and the difficulty which presents itself to my mind is, whether there appears in this case a sufficient ground upon which the Court can safely rely, to conclude that all the jury did hear what was propounded for them, and on their behalf, by the foreman. Now, all the jury were not at the time within the sight and view of the learned Judge, for it seems that a part were in the room behind; so that we have not, in this case, the ordinary *means which exist in other cases, for presuming that every one of the jury must have heard what was propounded on their behalf by their foreman. If they did not hear it, they were not furnished with any means of contradiction, or signifying any dissent or qualification, and it cannot be considered as the verdict of all, because it is only their verdict if propounded by the foreman with the assent of all. This circumstance affords a distinction from all the cases which have usually come before the Court, because verdicts are usually given by the jury standing together in the view of the Judge, and with full opportunity of hearing everything which is propounded by the foreman, and of expressing their dissent, if they think fit so to do. If it could be made out satisfactorily from the position in which the jury stood, their proximity to and being in view of the Judge, that all heard and none dissented, it would be too much to disturb the verdict, and certainly the Court would not entertain a motion of that kind founded upon an affidavit of a juryman. But the perfect evidence of all the jury having heard, and having the means of dissenting if anything was untruly propounded on their behalf, seems to be wanting in this case; and therefore I would suggest for the consideration of the Court, whether, under the uncertainty that exists (and any uncertainty is to be avoided, especially, in a criminal proceeding), it should not be allowed to the defendant to have the advantage of a new trial, if he should be disposed to apply for it.

The *Attorney-General* said, that he apprehended the utmost extent to which his Lordship intended that the defendant should be indulged, was to be permitted to lay before the Court grounds for a new trial. The jury *were certainly all called over, and they answered to their names.

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[LORD ELLENBOROUGH, Ch. J. : We assume that.]

All were within hearing at the time, and the verdict was pronounced in such a tone of voice, that it must have been heard by all present.

BAYLEY, J. :

I understand the learned Judge who tried the cause entertains a doubt, whether the verdict, ultimately pronounced by the foreman, was distinctly heard by each and every of the jurors.

LORD ELLENBOROUGH, Ch. J. :

The want of seeing them renders it doubtful whether they all heard what passed. If the Judge had seen all the jury, it would have afforded an unquestionable presumption that they all heard what took place.

The *Attorney-General* :

The Court will expect it to be made out satisfactorily that the jurors did not hear.

LORD ELLENBOROUGH, Ch. J. :

The Court think they are precluded from the means of acquiring that knowledge through an affidavit of any of the jurors: if they cannot agree in their verdict, they ought to express dissent at the time. But if the jurors, at the time when their verdict was delivered by the foreman, had not the means of hearing what was propounded for them, there is no need of their affidavits upon that point. If the verdict had been given under such circumstances as ordinarily occur, the Court would infer their consciousness of what was propounded by their foreman. But the danger would be infinite from allowing such affidavits

THE KING to be received ; and this has, doubtless, in former times deterred
 WOOLER. the Court *from yielding to such applications. I do not know
 [*371] that an application of this kind has ever been made.

BAYLEY, J. :

The Court, sensible of the difficulty, felt that it was due to my brother ABBOTT himself, and to the public, that he should make this communication. I agree entirely with my Lord in all the observations he has made with reference to this case: it is peculiarly circumstanced ; for the jury were in such a situation as not all to be within view of the Judge: he could not see them all, nor could they all see him, and as soon as decorum would allow, the communication of dissent was made.

The *Attorney-General* then said, that if the Court, under all the circumstances, thought there ought to be a new trial, he, standing there as the officer of the Crown, ought not to resist it.

HOLROYD, J. :

I do not see how the Court could with propriety, under the circumstances stated, proceed to pass judgment.

The *Attorney-General* :

After the opinion expressed by the Court, I shall not hesitate, if the Court does not think it improper, to pray that a new trial may be granted.

LORD ELLENBOROUGH, Ch. J. :

Mr. *Attorney-General*, you act as becomes you.

The following rule was entered :—

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6th of June, Trinity Term, 57 Geo. III.

Rex v. Wooler.—Upon hearing the report of Sir Charles Abbott, Knight, one of the Justices of this Court, It is ordered that the verdict obtained in this prosecution, at the sitting of Nisi Prius holden after the last term in and for the city of London, be set aside, and a new trial had ; Mr. *Attorney-General* being present here in Court and consenting.

By the Court.

On the following day (Saturday, June 7th) *Chitty* moved that the defendant, who was then a prisoner in the King's Bench, might be brought up on a day to be appointed, in order to move for a rule to shew cause why the entry of the supposed verdict should not be cancelled and vacated, and why the rule for a new trial should not be discharged; and he prayed that in case the day appointed should not be within the first four days, the defendant might be at liberty to move to this effect after the four days.

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Lord ELLENBOROUGH, Ch. J. intimated that in the present position of the business of the Court it was not possible to fix a day; † but it was reasonable that the defendant should not be prejudiced by the lapse of the four days.

And now on this day (Thursday, June 19th) the defendant appeared in Court, and moved in person, that the verdict said to have been given against him should be erased from the record of the Court, forasmuch as it *was in law no verdict, being wanting in that unanimity which is the essence of and necessary to sustain every verdict. And in order to shew the want of unanimity, he tendered the affidavits of two of the jury; and took this distinction as it regards the receiving of affidavits from individual jurymen, that where the jury are unanimous at the time of the verdict given, an affidavit of any one of the jurors cannot be received to alter the verdict; *aliter*, where the jury do not all agree, and the verdict is by mistake. And for this he cited *Rex v. Simons*, † and also what was said by Lord MANSFIELD, Ch. J. in *Rex v. Woodfall*, § that “Where there is a doubt upon the Judge's report as to what passed at the time of bringing in the verdict, then the affidavits of jurors or bystanders may be received, upon a motion for a new trial.” He likewise cited *Hill v. Smith*, Worcester Assizes, 1809, which, he said, afterwards came before this Court, when affidavits of some of the jury were received; but this was contradicted by *Jervis* and *Puller* (*amici curiæ*), who were of counsel in the cause, and stated

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† See note to the case of *Offley v. Dickens*, 6 M. & S. 348.

† Say. R. 34; S. C. 1 Wils. 329.
§ 5 Burr. 2667.

THE KING that an affidavit from one of the jurors was tendered, but not
 WOOLER. received. He then argued upon the former authorities, that affidavits of jurymen were admissible in cases where a verdict had been recorded in which the whole had not concurred. And he relied on the report made by the learned Judge who tried the cause, as shewing that degree of ambiguity which must induce a belief that the verdict was not understood, and was not unanimous.

ABBOTT, J.:

[*374] All I conceived was, that, from the particular situation of some of the jury, they might not *exactly hear what passed, and, thinking so, I deemed it right to state the circumstance to the Court at the earliest opportunity.

The defendant here proceeded to urge the admission of his affidavits, and in so doing, was allowed to state *arguendo*, that the affidavit of one of the jurors deposed to his having contradicted the verdict at the moment the foreman delivered it; but that not being in Court his observation was not heard by the Judge, although it was heard by a person in Court, and by an officer of the Court: and that the affidavit of one of these persons, which he also tendered, corroborated that of the jurymen, for it deposed, that when the question was put to the jury, and in reply thereto the foreman said guilty, the deponent heard the said jurymen say, "No, I do not agree;" and that he spoke this so loud, that had he been in Court at the time, the deponent believed the Judge must have heard it.

LORD ELLENBOROUGH, Ch. J.:

Although we have not received these affidavits, we have permitted their contents to be discussed, and from anything that appears, I see no reason to alter the course which has been taken.

BAYLEY, J.:

I think the rule which has been pronounced is the only rule which the Court could, under the circumstances, have pronounced, had the affidavits been receivable. But great danger would be likely to follow from receiving affidavits of jurors after their

verdict has been recorded. It ought to be done with great caution and circumspection. But even if they *had been received, the utmost that the Court could have done would be to grant a new trial. The application to have the verdict erased is a novel one, and, if granted, would in effect be doing what has already been done. For the granting of a new trial does erase the verdict: the form of the rule is, that the verdict be set aside and a new trial granted. Then the only remaining object of such an application would be to agitate the question whether that new trial should be had by the old or by a new panel. On the principle furnished by *Rex v. Perry*,† I have no doubt that there ought to be a new panel; for jurors ought to come to the trial with minds unbiassed, unprejudiced and, I may add, unprepared, and, so far as may be, without any knowledge of the facts; and are not to come together again upon the same question after they have already been impanelled upon it; for then they cannot come with that free and unprejudiced mind which is essential to justice, and is the duty of the Court to provide. *The Mayor of Doncaster v. Coe* † is another case on which I form my opinion. Two actions were brought by the same plaintiff against several defendants, upon the same right. In both, special juries were struck consisting of the same persons. One was tried, and the Court directed the verdict to be set aside, and the cause to abide the event of the trial of the other cause; and they would not allow that the second cause should be tried by the same persons, though a different panel, and discharged the jury from it, and directed a new panel. And it being our duty to take care that the *course of justice is kept pure and even, I hold to the opinion above stated.

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LORD ELLENBOROUGH, Ch. J.:

In no instance that I am aware of can it arise that the same jury should be suffered to re-assemble to consider the same question after they have been mixed with the multitude. If the Court were to suffer that to be done, what animadversions might well be made upon it by the enlightened part of society.

† 5 T. R. 453, and Howell's State Trials, vol. xxii. p. 954. † 3 Taunt. 404.



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The defendant observed that he asked to have the verdict erased as being a nullity and improperly recorded, and that he understood the granting a new trial was not the same thing as erasing the verdict.

HOLROYD, J. :

A verdict was taken and recorded, and it is merely on the ground of its being possible that some of the jury might not have heard what passed that the Court have granted a new trial. The necessary consequence is, that the verdict is set aside. The statute for the regulation of juries † only directs that the special jury, struck in the manner therein mentioned, shall be returned for the trial of the issue. There has been a trial, but the result is not satisfactory. The Court have power over the panel if the justice of the case requires it; and it is not contradictory to the statute to award a new panel. That was done in the case of *The Mayor of Doncaster v. Coe*, ‡ and it is proper in my opinion that it should be done in this case.

ABBOTT, J. :

[*377] The present application is to erase the verdict. Now the Court does not proceed to order anything *to be done without considering the effect of it when done, and what is the object of the application. If the object of the present application be to have a new trial, that object is already attained, for the Court has pronounced a rule for a new trial; but if there be an ulterior object, as it has been suggested, that the new trial should take place before the same persons by whom the former trial was had, then I think the object of the application ought not to be granted; because the Court cannot and ought not to direct a new trial before the same persons. To direct a new trial before the identical twelve persons who constituted the former jury would, indeed, be out of its power; because they were composed partly of special and partly of common jurymen; and the Court has no process by which it can order the same twelve persons to be assembled again to rehear the case, and reconsider their verdict. It has been the invariable practice

† 3 Geo. II. c. 25 [repealed 6 Geo. IV. c. 50, s. 62].

‡ 3 Taunt. 404.

with all courts, where a new trial is granted, that it should be by a fresh jury. If, therefore, the object be to have a new trial generally, it is already granted; if it be that the new trial should be before the same jury, it is as impossible as it would, in my judgment, be improper. It may not be unfit that I should take this opportunity of stating what my suggestion to the Court originally was. It was communicated to me that some mistake had occurred in consequence of the jury not having all heard what passed. I thought it possible, from the situation of some of the jury, that this might be the case; and this led me to take the first opportunity of mentioning it to the Court. The Court, on consideration, thought it fit that a verdict should not be taken, if a doubt could fairly be suggested whether all the jury did agree; and *upon that the Court was pleased to grant a rule for a new trial, considering this as the most favourable course for the defendant. One great reason which has weighed with me in this proceeding was, to avoid everything like a precedent for the receiving of affidavits from the jury; the mischief of which I feel to be greater than I can express.

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Motion refused.

The defendant then moved to set aside the rule for granting a new trial, offering the affidavits of two bystanders.

LORD ELLENBOROUGH, Ch. J.:

The affidavits of bystanders may be received as to what passes within their knowledge. This was, I think, so considered in a case from Durham; † but will the effect of these affidavits lead to a different conclusion?

The affidavits were here allowed to be read, one of which stated, in substance, that at the time when the verdict was pronounced, the foreman and only two or three of the jury were visible to the deponent; that he could not see several of the jury, and he believed that there were several of the jury who could neither hear nor see the Judge. The other stated, that

† See *Vaise v. Delaval*, 1 T. R. 11; *Owen v. Warburton*, 8 R. R. 817 (1 Bos. & P. (N. R.) 326).

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WOOLER. when the jury came into court, the foreman was asked whether they were agreed in their verdict, who answered they were; but the deponent heard one of the jury say, "we are not agreed," or words to that effect.

[379] LORD ELLENBOROUGH, Ch. J. :

I see nothing in these affidavits against granting a new trial.

The *Attorney-General* said, that he did not object to a new trial after what had passed. If an improper verdict had been recorded, the only way to get rid of it was by granting a new trial, unless there be error on the record. If there be any mistake before the verdict is recorded, the jury may be sent back to reconsider it; but to use the words of Lord Coke, *after* the verdict is recorded, the jury cannot retract or alter it. If the Court see error in fact, they will grant a new trial; and so if upon the report of the Judge they are not satisfied that the jury was agreed.

LORD ELLENBOROUGH, Ch. J. :

Let there be a *venire facias de novo*, and let the defendant be remanded.

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(6 M. & S. 385—393.)

1817.
June 20.,

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A declaration, charging the defendant, as proprietor of a common stage coach for carrying passengers from London to Manchester for hire, and that he received M. A. as a passenger to be safely carried from M. to L. for a certain fare, and by reason thereof, ought carefully to have conveyed her, yet defendant, not regarding his duty, conducted himself so carelessly, that by the negligence of him and his servants, and for want of due care and attention to his duty, the coach was overturned, whereby M. A. was injured, &c. was held to be a declaration in tort, and, therefore, that a plea in abatement, that other persons were joint proprietors with the defendant, was ill.

THE plaintiff declares, that whereas before and at the time of committing the grievances, the defendant was the proprietor of a common stage coach by him used in carrying passengers from London to Manchester for certain hire and reward; and so being such proprietor, the defendant heretofore received Margaret, the wife of the plaintiff, and she became and was a passenger by the said coach, to be safely and securely carried by the said coach from Manchester to London for a certain fare or reward in that behalf, and by reason thereof the defendant ought carefully to have conveyed or caused her to be conveyed in and by the said coach from Manchester to London. Yet the defendant, not regarding his duty in this behalf, conducted himself so carelessly, negligently, and unskilfully in the premises, that by and through the carelessness, negligence, unskilfulness, and default of himself and his servants, and for want of due care and attention to his duty in that behalf, the said coach afterwards, and whilst the same was carrying and conveying the said Margaret as aforesaid, and before the arrival thereof at London, was overturned, by means whereof the said Margaret was greatly injured, &c.

Plea, in abatement, that Elizabeth Goude and fifteen other persons (naming them) were joint proprietors with the defendant in the said coach, and jointly with the defendant received the

† *Taylor v. M. S. & L. R. Co.* '95, 1 Q. B. 134, 14 R. Jan. 350, 64 L. J. Q. B. 6: and see note at end of *Buddle v. Willson*, 3 R. R. 202, 206. As to the assumption that a carrier of passen-

gers is responsible as a common carrier, see *Readhead v. Midland Railway Company* (Ex. Ch. 1869) L. R. 4 Q. B. 379; 38 L. J. Q. B. 169.—R. C.

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said Margaret as passenger, and were jointly liable with the defendant carefully to *convey her, and that it was their joint duty to carry and convey her; and that if there has been any breach of duty whereof the plaintiff could complain, such breach was committed by them jointly with the defendant, and the said supposed causes of action arose from the breaches of contract made by them jointly, &c.

Demurrer,—assigning for causes, that the plaintiff having declared in case and not for any breach of contract, it was not competent to the defendant to plead in abatement the non-joinder of the other persons named in the plea. Joinder.

Richardson, in support of the demurrer, adverted to the inconvenience likely to arise if it should be holden that all the parties concerned in interest in the adventure must be joined as defendants, for then every action of this sort against a carrier must necessarily be preceded by a bill for discovery of parties. On the other hand, he said, that no inconvenience would result from holding one of several parties liable, because he might have contribution against the others. And although all should be joined, yet doubtless the plaintiff might have execution against one only, so that the defendant would in the result have no advantage from his plea in abatement. And suppose the plaintiff were to begin *de novo* joining all the parties in conformity to this plea, nevertheless he must prove them to be jointly concerned; for as to this the plea would not help him. These considerations, he said, might well lead the Court to incline against the plea, unless they were bound down by the authorities. Now the authorities are various. The first is but a *dictum*, though certainly of a very eminent *Judge, that such a plea might be supported; † and the case on which that *dictum* is understood to have proceeded has been shaken to the very foundation.‡ On the other hand, if this be assumption and not tort, how comes it to have been decided, that a count in trover may be joined? § or that judgment may be had

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† Per Lord KENYON, in *Buddle v. Willson*, 3 R. R. 205 (6 T. R. 373).

Govett v. Radnidge, 6 R. R. 539, 544 (3 East, 62, 69).

‡ Per Lord ELLENBOROUGH, in

§ *Dickon v. Clifton*, 2 Wils. 319.

against the third, if two have a verdict in their favour? † As to *Powell v. Layton* † and *Max v. Roberts*, § which, perhaps, may be considered as counter-authorities, it is enough to say of the latter that it passed entirely upon the authority of the former; and to both the observation applies, that the declaration did not as here charge the defendants as common carriers, and that it was treated as founded in contract, as upon an agreement to carry, and a failure of the agreement. But in this declaration, all reference to contract is carefully avoided, and the whole rests on his duty as a common carrier for hire, sounding, therefore, entirely in tort. In *Weall v. King*, || the declaration was upon a bargain and warranty in a joint sale of lambs by the two defendants; so that the joint contract was essential to the existence of the warranty, and required proof corresponding with the description of it.

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Chitty, contra :

This declaration is not according to the old form of declaring against a common carrier upon the custom of the realm, it does not even designate the defendant as such, but sounds rather in contract *than in tort against the defendant, as proprietor of a coach running for hire. It would be strange, therefore, if the action being assumpsit the plaintiff should by departing from the form of declaring in some particulars be able to defeat the defendant of his right to have all the joint contractors made parties. But that this cannot be done has been long settled; for the Court has pronounced, that if the action be founded in contract, although it be couched in the form of tort, the plaintiff shall not by changing the form vary the liability of the defendant; and, therefore, in such a case the defendant was permitted to plead his infancy. ¶ The same principle governed the decision in *Weall v. King*; and *Powell v. Layton* is precisely like the present, being a loss occasioned by negligence arising out of a contract. It is remarkable, that even where the action

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† *Govett v. Radnidge*, 6 R. R. 539 (3 East, 62).

‡ 7 R. R. 660 (2 Bos. & P. (N. R.) 365).

§ 2 Bos. & P. (N. R.) 454; S. C. on

error, 12 East, 89 [overruled by *Kendall v. Hamilton* (1879) 4 App. Ca. 504].

|| 11 R. R. 445 (12 East, 452).

¶ *Jennings v. Rundell*, 4 R. R. 680 (8 T. R. 335).



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was founded on the custom of the realm, it was at one time thought to be *quasi ex contractu*.† And the rule is expounded clearly in a note to *Cabbell v. Vaughan*,‡ that if an action be brought against one only of several persons upon a matter founded in contract, though the form of the action be case for malfeasance or nonfeasance, to which the plea is not guilty, yet the defendant must plead it in abatement.

LORD ELLENBOROUGH, Ch. J.:

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This is an action against the defendant as a common carrier. There is not a single term to be found in this declaration which is not also to be found in the declarations habitually used until the modern practice was introduced of declaring as upon *a supposed contract. The practice of declaring against common carriers on the custom of the realm is as ancient as the law itself, and was uniformly adopted until somewhere about the time of *Dale v. Hall*. Since then it has been usual not to declare in this form, but in contract; yet the modern use does not supersede, although it has supplanted the former practice of declaring in tort. The advantage of proceeding on the custom of the realm is, that the plaintiff may sue one or more of several tort feasons, for in tort all the parties need not be joined. Looking at the declaration now in question, I do not find one word sounding in contract; what then is there to oust the plaintiff of the benefit of declaring on the custom with all its consequences? It is said the defendant is not charged *verbatim* as a common carrier upon the custom; but the declaration is tantamount, for it charges him as the proprietor of a common stage coach for hire, and alleges the negligence as a breach of duty arising out of the employment for hire and reward. *Powell v. Layton* was an action against a carrier by water for not safely conveying goods in a ship; and the ship was neither alleged to be a common ship, nor the defendant to be a common carrier. The declaration, moreover, referred to terms of express contract; for it alleged that the goods were to be delivered, all dangers and accidents of the seas and of navigation of

† *Dale v. Hall*, Selw. N. P. 408 n, 7th edit.

‡ 1 Saund. Serjt. Williams's edit. 291 d. n. (4).

whatever kind excepted; which exception could only have subsisted by virtue of an express contract. But I consider this declaration as entirely different, as founded on the obligation of duty attaching to the defendant in his character of a common carrier; and although the plaintiff might have adopted the more modern course of proceeding in assumpsit, this will not hinder his declaring *now as plaintiffs used to do for centuries before the case of *Dale v. Hall*. This, then, being in substance an action founded on the custom of the realm in tort, one of the consequences which follow is, that the plaintiff has his election to proceed against all or any of the parties liable. Without going farther into the cases, which were much considered in *Gorett v. Radnidge*, I think this action may be maintained against the defendant alone, and, therefore, that the plea is ill pleaded.

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BAYLEY, J. :

There is a broad distinction in personal actions between tort and assumpsit, or such actions as arise *ex contractu* and *ex delicto*, which are founded upon contracts, or for wrongs independently of contract. And the proceedings vary accordingly: in assumpsit, the plaintiff in his declaration and proof is confined to the very terms of the contract, and can recover no damages for any tortious act, farther than as it is a breach of the defendant's promise express or implied; whereas actions upon the case lie for the recovery of damages for consequential wrongs, accruing from misfeasance or nonfeasance, from the negligent or wilful conduct of the party sued, in doing or omitting something contrary to the duty which the law casts upon him in the particular case. This distinction gives rise to some others; one of which is, that in assumpsit, if the whole damages be levied on one of several defendants, he may sue the others for their contribution. But it by no means follows that the same may be done where the action is *ex delicto*,† and where the injury may have arisen more immediately *from the wilful act of one of the parties. Now the present action is, as it seems to me, founded altogether on a misfeasance or breach of

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† See *Merryweather v. Nixan*, 16 R. R. 810 (8 T. R. 186).

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the particular duty imposed by law on this defendant. The declaration states the defendant to be the proprietor of a common stage coach for hire and reward. It designates the coach as a common stage coach, and the defendant as a carrier of passengers by that coach for hire. He is therefore a common carrier for hire. Accordingly, the declaration goes on to allege that he ought carefully to have conveyed his passengers, and then alleges for breach, that not regarding his duty, he conducted himself so carelessly, that by his negligence, or that of his servants, the coach was overturned. In such a case, that the plaintiff is entitled to recover damages for the injury sustained there can be no doubt; the occasion of it might be either the wilful or unskilful act of the party, a nonfeasance or misfeasance, and it might arise from the act of one of several proprietors. But to plead in abatement that other coach proprietors were jointly guilty of negligence is at least a novelty, and I for one never saw such a plea. The old pleas in abatement are confined to actions in the form of contract. If it were necessary upon the present occasion to choose between conflicting cases, I should be disposed to adhere to *Gorett v. Radnidge*; but I think it is not, because the present case is distinguishable from *Powell v. Layton* and *Max v. Roberts*; for I consider this action as founded entirely on a breach of duty cast by law on the defendant as a common carrier.

ABBOTT, J.:

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I am of the same opinion, that the plaintiff is entitled to judgment; and that this decision *will not interfere with any of those which have been cited on the other side; because in those, although the declaration alleged a breach of duty, it appeared that the duty arose out of a special contract, and not out of a general obligation of law. All that I understand to have been decided in those cases is, that when it is in substance a contract, the rights of parties shall not be changed by the form of declaration. In the present case, however, the duty, as it seems to me, attaches entirely on the defendant, from the general obligation cast on him by the law as a common carrier. The declaration, which has already been very particularly commented

upon, charges the defendant substantially and accurately as a common carrier. And it is clear, that a common carrier may be charged *ex delicto*. Anciently, indeed, it was the only form of declaring; it is only in modern times that another form has been adopted, by declaring as upon a special contract. The plaintiff may so declare if he thinks fit, but he is not obliged to do so; he may adhere to the ancient practice. There is nothing to compel a plaintiff to elect that form which may be most convenient to the defendant. The very notion of election imports that the plaintiff may exercise it for his own benefit.

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HOLROYD, J. :

I am also of the same opinion. This action is founded on that which is collateral to contract; for the terms of contract with a common carrier, provided they do not vary his general responsibility, are quite immaterial. Let us, then, consider how this is in the present case. The declaration charges the defendant as proprietor of a common stage coach carrying passengers from place to place for hire and reward, which *is equivalent to charging him as a common carrier. It then alleges the fact of his receiving the plaintiff's wife as a passenger, to be safely and securely carried from one place to another, and vouches the obligation cast on the defendant by law, not by contract. Now, according to the ancient law, a common carrier is in the nature of a public officer, bound to the discharge of a general duty; and any person who undertakes it is answerable as such. So inn-keepers are considered in the same light; and, therefore, if one who keeps a common inn refuse to receive a traveller, or to find him victuals or lodging, he is not only liable for damages in an action on the case, but may be indicted for it. And there have been also many indictments against them for extortion in cases where exorbitant prices have been exacted from their guests.† It seems to me, therefore, that although the law will raise a contract with a common carrier to be answerable for the careful conveyance of his passenger, nevertheless he may be charged in an action upon the case for a breach of his duty; and that the declaration in question is not formed upon the implied con-

[*393]

† See Cro. Jac. 610; Carth. 150; Skin. 291, pl. 2.

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HOUSE.

tract, but on the general obligation of law arising from the defendant's duty as a common carrier. Therefore the plea in abatement cannot be sustained.

Judgment for the plaintiff.

1817.
June 20.

THE KING v. THE JUSTICES OF SOUTHAMPTON.†

(6 M. & S. 394—396.)

[894]

Where an order of removal was made on the 2nd January and served on the 7th, and the sessions were holden on the 14th, and the appellant parish was fifteen miles from the place of holding the sessions, by the practice of which sessions eight days' notice was required in order to enable an appellant to enter and try his appeal: Held, that the appellant might pass by the first sessions, and give notice for, and enter and try his appeal at, the following sessions.

A RULE *nisi* was obtained on a former day for a mandamus to the Justices of the county of Southampton to receive and hear an appeal against an order of removal from Ropley to Bentworth.

The order was made on the 2nd of January, and served on the 7th. The sessions were holden on the 14th at Winchester. By the practice of the sessions eight days' notice is necessary in order to entitle a party to have the appeal heard. The distance between the two parishes is five miles, and Bentworth is fifteen miles from Winchester. No appeal was entered at the Epiphany sessions; but at the Easter sessions, a regular notice having been given that the appeal would be entered and prosecuted, the appellants claimed to enter and be heard accordingly. The sessions, conceiving that the appeal ought to have been entered and respited at the former sessions, dismissed it.

Maule shewed cause, on the ground that the appellants were served with the order of removal in time to enable them to have entered and respited their appeal at the Epiphany sessions, although the appeal could not then be heard; the

† Cited and applied in *Reg. v. Justices of Surrey* (1880) 6 Q. B. D. 100; 50 L. J. M. C. 10.—B. C.

Epiphany sessions were, therefore, the next sessions with reference to the time given by law to appeal, although not the next as to the hearing of the appeal. But there is no rule which allows a party to let slip the next sessions, because he is not in time to have his appeal heard as well as entered. And *he cited *Rex v. Justices of Herefordshire*,† *Rex v. Justices of Wilts.*; and *Rex v. Justices of Dorsetshire*,§ from which he argued, that the only point to be considered was, whether the party had reasonable time to enter his appeal.

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[*395]

Gaselee, *contra*, observed upon the delay created by the removing parish by not serving the order until the 7th, and insisted upon the unreasonableness of the argument, which would compel the appellants to incur the useless expense of going to the sessions in order to enter the appeal, when by the act of the respondents they were precluded from being heard. And the only reason why the Court refused a *mandamus* in *Rex v. Justices of the West Riding of York* || was, because the appellants having passed over the first sessions had also neglected to give notice so as to be in a condition to try at the following sessions.

LORD ELLENBOROUGH, Ch. J. :

The order was made on the 2nd and not served till the 7th ; and the sessions were held on the 14th. What prevented the order's being executed promptly ? If it had been served immediately, the appellants might, for any thing that appears to the contrary, have gone to the first sessions and tried their case. The respondents having by their own act abridged the time, it seems reasonable that the appellants should be allowed to the next sessions, *nunc pro tunc*, for this purpose : for where delay has been *caused by one party the most favourable construction should be adopted as it regards the other.

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BAYLEY, J. :

It seems very fit, under the circumstances, that this appeal should be heard.

† 3 T. R. 504.

‡ 2 Bott, 717, 4th edit.

§ 13 R. R. 443 (15 East, 200).

|| 4 M. & S. 327.



THE KING ABBOTT, J. :

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SOUTHAMP-
TON.

The effect of the delay was to prevent the appellants, if they had been so minded, from trying their appeal at the first sessions. Allowing that a satisfactory reason might be given for the delay, still the appellants ought not to be prejudiced by it.

HOLROYD, J. :

I am of the same opinion.

Rule absolute.

K. B. MICHAELMAS TERM.

UMPHELBY *v.* M'LEAN AND ANOTHER.

(1 Barn. & Ald. 42—45.)

1817.

[42]

Assumpsit for money had and received, brought to recover the amount of an excessive charge made by the defendants as collectors, on a distress for arrears of taxes: Held, that the defendants were not entitled to a month's notice before action brought, under stat. 43 Geo. III. c. 99, s. 70,† which provides that no writ or process shall be sued out for anything done in pursuance of that Act, till after one month's notice.

ASSUMPSIT for money had and received. Plea, *non assumpsit*. At the trial before Dallas, J. at the last Spring Assizes for the county of Kent, it appeared that this action was brought to recover the amount of an excessive charge, made by the defendants as collectors of taxes, for their expenses upon a distress upon the plaintiff's property, for an arrear *of taxes. Two objections were raised on the part of the defendants, first, that under the stat. 43 Geo. III. c. 99, the defendants were entitled to a month's notice, before action brought. Secondly, that the action had not been commenced in time, that is, not within six months next after the fact committed. The excessive charge having been clearly proved, the learned Judge directed the jury to find a verdict for the plaintiff, with liberty to the defendants to move. Accordingly, in Easter Term last, *Gurney* obtained a rule *nisi* to set aside the verdict and enter a nonsuit, against which

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Marryat now shewed cause:

The question is, whether in assumpsit to recover back money improperly taken from the plaintiff, the defendants are entitled to the protection afforded by the 70th section of the Act, by which it is enacted, "that if any action shall be brought against any person, for any thing done in pursuance of this Act, such action

† See now 43 & 44 Vict. c. 19, note to *Briggs v. Evelyn* (1792) 3 R. R. s. 20. And as to parallel cases, see 354, 355 (2 H. Bl. 114 n.).—R. C.

UMPHELEY shall be commenced within six calendar months next after the fact committed ; and no writ or process shall be sued, until one calendar month next after notice shall be given to the defendant, and the defendant may within the month tender amends, and may plead the same if not accepted in bar of the action, &c.” This is an action for a non-feazance, in not returning back the money which the defendants extorted from the plaintiff. The Act of Parliament extends its protection to cases of misfeazance and trespass, and not to cases of this description. The action contemplated by the Legislature is that species of civil remedy which is used to obtain a compensation for a tortious act done. In this case, the action is brought, not in consequence of an act

[*44] *done, but of the defendants omitting to do that which they ought to have done, *i.e.*, return the money. In this case, the damages are confined to the precise sum, which the defendants wrongfully withhold. In actions of tort, the damages are in the discretion of the jury. The term, tender of amends, applies expressly to an action of tort ; for in an action of contract, it is competent to defendants, without the aid of an Act of Parliament, to tender the sum due, and plead such tender in bar of the action. The Legislature must therefore have contemplated actions where a tender could not otherwise be made. The action too is to be brought within six months after the *fact committed* : there was no fact committed here ; the six months must therefore be calculated from an indefinite period. From the terms act done, fact committed, and tender of amends, it is evident that the Legislature contemplated a different species of action from that now before the Court.

Gurney, contra :

The officers were authorized by the Act to take the distress, and cause the same to be sold, and to deduct out of the proceeds the costs of the distress ; and as they may in execution of the duties so imposed on them by the Act have inadvertently made an undue charge, as well as committed any other wrongful act, it seems reasonable that they should have notice in one case as well as the other, for without such notice, they may not be aware of the specific cause for which the action is brought ; and to

shew that notice was required in an action for money had and received, he cited *Greenaway v. Hurd*,† where, in such an action, brought against an excise officer to recover back duties exacted *after the Act of Parliament imposing them had expired, such a notice was held necessary.

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[*45]

LORD ELLENBOROUGH, Ch. J. :

From the words of the Act I am clearly of opinion, that it does not apply to a case of this description : all the expressions refer to some act done, or fact committed. There must be a positive act done : in this case, there was neither act done nor fact committed. The language of the Act is too clear to admit of any doubt.

BAYLEY, J. :

If the plaintiff failed in establishing his claim which is for a debt, he would, according to the construction contended for, be liable to treble costs.

ABBOTT, J. :

By a subsequent part of the clause, the commissioners for the division are to defend the action, and the costs shall be defrayed by an assessment on the parish. I am very clear that the Legislature did not intend the defence of such an action to fall on the parish.

HOLROYD, J. concurred.

Rule discharged.

† 4 T. R. 553.

1817.

PHIPPS *v.* SCULTHORPE.†

(1 Barn. & Ald. 50—53.)

[50]

Where premises had been let to B. for a term determinable by a notice to quit, and pending such term C. applies to A., the landlord, for leave to become the tenant instead of B., and upon A. consenting, agrees to stand in B.'s place, and offers to pay rent: Held, that (though B.'s term had not been determined either by a notice to quit or a surrender in writing), A. might maintain an action for use and occupation against C., and that the latter could not set up B.'s title in defence to that action.

[*51]

ACTION for use and occupation, and verdict for the plaintiff for a year's rent. At the trial before Dallas, J. at the last Spring Assizes for the county of Surry, the plaintiff gave in evidence that in February, *1815, the premises in question were let by him under a written instrument to one Newton Frie Hicks, at a certain rent, to hold from the 14th February, for three calendar months, and from the expiration of that period for three calendar months longer, and so on, from three months to three months, and either party was to give the other six calendar months' notice to quit. That the defendant, after Hicks had occupied the premises about two months, applied to the plaintiff, to become the tenant instead of Hicks, stating that Hicks owed him a sum of money, which he hoped to get by taking his stock, and that upon his consenting, the defendant took the premises, and agreed to stand in Hicks's shoes, and farther that the defendant offered to pay the plaintiff a quarter's rent. It was objected, that the plaintiff could not recover, because Hicks, not having transferred his interest to the plaintiff, still had in him the legal interest, and that the present plaintiff, having no legal estate, was not entitled to recover; but the learned Judge directed the jury to find a verdict for the plaintiff, reserving to the defendant leave to move to enter a nonsuit; and *Marryat*, in last Easter Term, obtained a rule *nisi*, against which cause was now shewn by

† In *Hyde v. Moakes* (1831) 5 C. & P. 42, *coram* Parke, J., the plaintiff's own evidence showed a subsisting lease to a third person, which had not been assigned and which ap-

parently was not determinable by notice, and there was no evidence of any agreement to substitute the defendant for the original tenant.—F. P.

Onslow, Serjt. (*Arabin* was with him) :

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v.
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THORPE.

To make the defendant liable for use and occupation it is sufficient to shew that he occupied as tenant to the plaintiff: and he cannot then dispute his landlord's title. The evidence is abundant on that point: he offers to stand in the place of Hicks who before was the tenant, and by the landlord's assenting to that proposal, the defendant himself became tenant; and if any thing were wanting to *prove a tenancy, it is amply supplied by an express offer to pay rent. The Court here called upon

[*52]

Marryat :

The legal interest in these premises was conveyed to Hicks, in 1815, by the written agreement, and that interest must continue in him till terminated in the mode there pointed out, *i.e.* by six months' notice to quit; no such notice was given, therefore Hicks's interest must have continued up to the present time, unless he has duly surrendered his estate in the premises. By the Statute of Frauds, such a transfer of his interest to be valid must be in writing: *Botting v. Martin*,† and *Mollett v. Brayne*,‡ are decisive that a tenancy from year to year, is not determined by a parol licence from the landlord to the tenant to quit, as well as that a parol assignment of a lease from year to year granted by parol is void under the Statute of Frauds. Hicks, therefore, did not duly surrender his interest; and that being a continuing term and never assigned, Hicks still continued tenant; and as between the parties to the suit, the legal relation of landlord and tenant never subsisted; and the effect of determining that the plaintiff may recover in this action, will be, that he has a double remedy for the rent, both against Hicks and the defendant.

LORD ELLENBOROUGH, Ch. J. :

I think that there is sufficient evidence to entitle the plaintiff to recover: the defendant applies for leave to take the premises, and upon obtaining the landlord's consent, does take them, and agrees to stand in Hicks's shoes; and besides that, he *offers to pay rent: this is more than sufficient to create a tenancy; and

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† 1 Camp. 318.

‡ 11 R. B. 676 (2 Camp. 103).

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being once a tenant, it is not competent to him to dispute his landlord's title.

BAYLEY, J. :

I think that the defendant, by taking the premises of the plaintiff, and agreeing to stand in Hicks's shoes, became tenant, and that he cannot call in question his landlord's title to let.

ABBOTT, J. :

The defendant agrees to take the premises of the plaintiff, does take and enter, and then says, that his landlord has no right to let : whereas by a well recognised rule of law a tenant cannot dispute the title of his landlord.

HOLROYD, J. concurred.

Rule discharged.

1817.
Nov. 6.

HOLLAND AND ANOTHER v. HALL AND GILL.

(1 Barn. & Ald. 53—56.)

[53]

Where A. agreed to sell to B. one-third share of a ship, which was then to be employed on a joint adventure, in the exportation of military stores to South America, contrary to an order in council then in force: Held, that (the agreement being entire, and containing on the face of it an illegal stipulation), it lay on the party seeking to enforce the same to shew that means had been used to obtain a licence, or that the illegal purpose had been abandoned, and that in failure thereof A. could not recover for the share of the ship.

[*54]

DECLARATION stated, that by agreement (21st May, 1816), between the plaintiffs and defendants it was agreed (*inter alia*) that the plaintiffs would sell to the defendants one-third share in a ship called the *Richmond*, for a certain sum, one moiety to be paid for by the defendant Gill's acceptance payable six *months after date from that day, and the other moiety to be paid by the defendant Hall's like acceptance; the ship to be taken with all faults as she lay in the Queen's dock on the 2nd December then last, after which date, all expenses upon her to be borne in the same proportions as the interests were held; the plaintiffs to bear two-thirds of all outfit and disbursements, and the defendants one-third thereof; and the plaintiffs agreed to furnish an account of all disbursements incurred upon the said vessel, since

the 2nd of December then last, up to the time of her sailing from Liverpool; and to receive in payment for the same the defendant Gill's acceptance of the plaintiffs' draft for one half the same, at four months' date from the day the vessel should be cleared at Liverpool custom-house; and for the other half of the said charges and disbursements, the defendant Hall's like acceptance of the plaintiffs' draft. Averment, that plaintiffs did sell the defendants one-third share of the ship, and that they, in pursuance of the agreement, drew bills of exchange upon Gill and Hall which were presented for payment; but that the defendants refused to pay the said bills or in any other way to pay for the price of the said ship; and that although the plaintiffs did furnish the defendants with an account of all disbursements, since the 2nd December up to the 1st July, 1816, the time of the vessels sailing from Liverpool, one-third of which amounted to

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£.; and although the vessel, on the 16th June, was cleared out of Liverpool custom-house, and although the plaintiffs caused their drafts to be presented to the defendants respectively, for a moiety of their disbursements for their acceptance; yet the said defendants refused to accept the said drafts, or *to pay the amount of the disbursements. Plea, general issue. At the trial before Dallas, J. at the last Spring Assizes for the county of Surrey, the plaintiff, in support of his case, gave in evidence the agreement, which contained, besides the part set out in the declaration, among other things, the following clause: "And it is hereby farther agreed between the said parties, that they shall be jointly interested in the same proportions, in a voyage to be undertaken with the said ship *Richmond*, from Liverpool to a port in Holland, with a cargo of rock salt; and also in a farther voyage to South America, with a view to sending out some military stores to that quarter. For this purpose, Holland Ackers & Co. have lately bought a quantity of military stores, which they now hold, and also the said George Gill and John Hall have bought a quantity of similar articles, and it is the intention of these parties to ship the said military stores on board of some small vessel, either from Liverpool or London, which may be chartered for the purpose, to go to a port in Holland, to meet the *Richmond*, with a view to be

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[*56]

transhipped on board her, as circumstances may best direct." It was objected, on the part of the defendants, that the exportation of military stores was contrary to an order in Council in full force at the date of the agreement, and such order in Council by the Act 29 Geo. II. c. 16, having the same force as an Act of Parliament, and this being one entire contract, the whole instrument was vitiated. No evidence was offered that the plaintiffs either obtained or used any means to procure a licence. DALLAS, J. directed the jury to find a verdict for the plaintiffs, with liberty to the defendants to move to enter a nonsuit. The jury found a verdict *for the plaintiffs, and in Easter Term last, a rule was obtained by *Marryat* for setting aside the same, and entering a nonsuit; and now cause was shewn by

Gurney and Chitty :

Although this agreement, if carried into effect before the expiration of the time limited by the order in Council, and without a licence, would be illegal, still as the mere effluxion of time, the procuring of a licence, or the abandonment of the illegal voyage, might legalize the whole, it is not necessarily unlawful; and the presumption is in favour of its legality. And they cited *Sewell v. Royal Exchange Assurance Company*,† *Haines v. Busk*,‡ to shew that subjects may enter into a contract illegal at the time, which may be rendered lawful before it is actually completed.

Marryat and Comyn, contra, were stopped by the Court.

LORD ELLENBOROUGH, Ch. J. :

The parties by this agreement appear to have contemplated one entire adventure, which was originally illegal; and I cannot discover that the illegal purpose was ever abandoned; or that anything was done to legalize it.

BAYLEY, J. concurred.

ABBOTT, J. :

If there be, on the face of the agreement, an illegal intention,

† 4 Taunt. 856.

‡ 5 Taunt. 521.

is it too much to say, that the burden lies on the party who uses expressions *prima facie* importing an illegal purpose, to shew that the intention was legal?

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HOLROYD, J. concurred.

Rule absolute.

ROOTH v. WILSON.†

(1 Barn. & Ald. 59—62.)

1817.
Nov. 6.

[59]

A. sends his horse, for the night, to B., who turns it out after dark into his pasture-field, adjoining to and separated from a field of C. by a fence, which C. was bound to repair; the horse, from the bad state of the fence, falls from one field into the other, and is killed: Held, that B., though a gratuitous bailee, might maintain an action against C. and recover the value of the horse.

CASE against the defendant for not repairing the fences of a close adjoining that of the plaintiff, whereby a certain horse of plaintiff, feeding in the plaintiff's close, through the defects and insufficiencies of the fences, fell into the defendant's close, and was killed. Plea, not guilty. At the trial before Richards, Baron, at the last Spring Assizes for the county of Nottingham, it appeared that the horse was the property of the plaintiff's brother, who sent it to him on the night before the accident; that the plaintiff put it into his stable for a short time, and then turned it, after dark, into his close, where his own cattle usually grazed, and that on the following morning the horse was found dead in the close of the defendant, having fallen from the one to the other. The liability to repair was admitted. Defence, that the plaintiff had not such a property in the horse as to entitle him to maintain this action. The learned Judge, however, suffered the cause to proceed, and the jury found a verdict for the plaintiff. In Easter Term last a rule was obtained by *Reader* for setting aside this verdict *and having a new trial, against which cause was now shewn by

[*60]

Copley, Serjt. :

The plaintiff had a property in the horse sufficient to entitle

† Cited in judgment in *Lawrence* 279; 42 L. J. Q. B. 147, 150.—R. C. v. *Jenkins* (1873) L. R. 8 Q. B. 274,



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him to maintain this action : he had possession of the horse, as a gratuitous bailee, and possession is sufficient as against a wrongdoer. Thus a bailee of goods to keep, or an agister of cattle, may maintain trespass† against a wrongdoer : and in the case of felony, it has been holden that the property is well laid in the following bailees ; agister of cattle, innkeeper, washer-woman, carrier, and even in a stage-coachman not being a part owner of the coach.‡ These authorities are decisive in support of the plaintiff's right to maintain this action. It may be said that the defendant would thereby be subjected to the costs of actions, both at the suit of the bailee and the absolute owner of the property ; but the case of *Flewelling v. Rave§* is decisive that that consequence would not follow. It was there expressly held “ that if goods are bailed to one man, to bail to another, and the first bailee doth not deliver them over, but converts them to his own use, he thereby makes himself liable to an action, both of the first bailor and of the person to whom they were to have been bailed ; but both shall not have their action, but he that first begins the action shall go on with the same.” The present plaintiff must, therefore, go on with the action he commenced, and the judgment obtained by him will be a bar to an action by the other.|| To support this action, it is *not necessary that the plaintiff should be liable over to the original owner of the horse ; if it were, however, he was so liable in this particular case ; for he turned the horse, after dark, into a dangerous pasture, to which it was unaccustomed ; and though the place might be perfectly safe to his own cattle, which were used to it, yet to this animal it was otherwise ; it was negligence therefore in him, in turning the horse into that field, and in that case he is clearly liable to the original owner.

[*61]

Reader, contrà :

The gist of this action is the consequential damage ; the person, therefore, who has actually sustained the damage, must sue. The plaintiff having no interest in the horse, is not damni-

† 2 Roll. Abr. 551.

‡ 2 East, P. C. 653.

§ 1 Bulstrode, 69.

|| Bro. Tresp. 67 ; 2 Roll. Abr. 569, pl. 5.

fied by its death ; and therefore cannot sue : the action can only be maintained by the owner of the animal, he alone being damaged. The plaintiff has not paid, or been called upon to pay, the value to the owner ; assuming, however, that a mere liability to damage is sufficient to enable him to maintain this action, he has here incurred no such liability ; for he has been guilty of no negligence. A gratuitous bailee is bound to take the same care only of the property intrusted to him, as he would of his own ; and the plaintiff in fact turned the horse into that pasture-field, which his own cattle were in the constant habit of using : in so doing he took the same care of the property intrusted to him, as he would of his own ; and then he is not liable over to the original owner.

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LORD ELLENBOROUGH, Ch. J. :

The plaintiff certainly was a gratuitous bailee, but as such, he owes it to the owner of the horse not to put it into a dangerous pasture ; and if he did not exercise a proper degree of care *he would be liable for any damage which the horse might sustain. Perhaps the horse might have been safe during the daylight, but here he turns it into a pasture to which it was unused after dark. That is a degree of negligence sufficient to render him liable : such liability is sufficient to enable the plaintiff to maintain this action ; he has an interest in the integrity and safety of the animal, and may sue for a damage done to that interest.

[*63]

BAYLEY, J. :

I am entirely of the same opinion : the plaintiff by receiving the horse becomes accountable. Case is a possessory action ; the declaration merely states that it was the horse of the plaintiff ; if this had been an indictment, might it not have been described as the horse of the plaintiff ? as in the common case of goods stolen from a washerwoman.

ABBOTT, J. :

I think that the same possession which would enable the



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plaintiff to maintain trespass, would enable him to maintain this action.

HOLROYD, J.:

The plaintiff was entitled to the benefit of his field not only for the use of his own cattle, but also for putting in the cattle of others; and by the negligence of the defendant in rendering the field unsafe, he is deprived in some degree of the means of exercising his right of using that field, for either of those purposes. Whether, therefore, the damage accrues to his own cattle, or the cattle of others, he still may maintain this action.

Rule discharged.

1817.
Nov. 6.

THE KING v. THE INHABITANTS OF WANDSWORTH.†

[63]

(1 Barn. & Ald. 63—67.)

Where the defendant has been acquitted on an indictment for not repairing a road, the Court will not grant a new trial; yet they will, under very special circumstances, suspend the entry of judgment, so as to enable the parties to have the question reconsidered upon another indictment, without the prejudice of the former judgment.

INDICTMENT against the defendants for not repairing a common highway. The defence was, that it was a private and not a public road. At the trial before Dallas, J. at the last Spring Assizes for the county of Surry, it appeared that this was a road distant five miles from the metropolis, lying between enclosed grounds, with a common at one end, where the cattle fed at all times of the year; that about forty-four years ago, in a part of this road where there had been a slough, a brick arch had been turned at the expense of one of the parishioners; that for eleven years successively, another of the parishioners had compounded for his statute duty, by repairing a part of this road; that it had been constantly used by the parishioners for conveying gravel from pits on Wandsworth common for the

† Cited as an authoritative precedent in judgment of *The Queen v. Inhabitants of Southampton* (1887) 19

Q. B. D. 590; 56 L. J. M. C. 112, 118.
—R. C.

repair of the other roads in the parish; besides which, much evidence was given to shew that it had generally been used as a highway. These facts were proved on the part of the prosecution. The defendants called no witnesses, and the jury found a verdict for the defendants. In Easter Term last, *Gurney* applied to the Court for a rule to shew cause why there should not be a new trial, admitting at the same time, that it was contrary to the usual practice of the Court to entertain such a motion where the defendant had been acquitted upon an indictment. The Court, adhering to their rule not to grant *a new trial in such a case, permitted *Gurney* to take a rule for staying the entry of the judgment upon the verdict given at the trial.

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WANDSWORTH.

[*64]

Marryat and *Lawes* now shewed cause against the rule, and contended that the effect of the present rule, if successful, would be to grant a new trial in a criminal case, when the defendant had been acquitted, and that was contrary to the practice of the Court; and they cited *Rex v. Reynell*,† and *Rex v. Mann*.‡

Gurney and *Nolan*, *contra* :

If this verdict be followed by judgment and another indictment be preferred, the judgment may be given in evidence, and will operate strongly with the jury; if the Court, therefore, see that this verdict is against the weight of the evidence, they will feel disposed to make this rule absolute, which will enable the prosecutor to try the question again without the prejudice that must necessarily be created by the verdict given in this case; and they cited *Rex v. The Inhabitants of Oxfordshire*,§ and *Rex v. Inhabitants of Middlesex*,|| to shew that under special circumstances *such a rule had been acted upon in this Court.

[*65]

† 8 B. R. 493 (6 East, 315).

‡ 16 R. R. 480 (4 M. & S. 337).

§ 16 East, 223.

|| *Rex v. The Inhabitants of Middlesex*. This was an indictment for not repairing Kingston bridge. Defendants pleaded, that from time immemorial the bailiffs and freemen

of Kingston had repaired, and of right ought to repair the same. The case stood for trial at the sittings after Trinity Term, 53 Geo. III.; but a similar indictment, charging that from time immemorial the bailiffs and freemen of Kingston were bound to repair, immediately

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My objection to making this rule absolute is, that the Court will thereby be doing indirectly that which, if they did directly, would be contrary to the established practice of the Court, acted upon in a variety of cases ; that is, they will in effect be granting a new trial in a criminal case, where the defendant has been acquitted. But there certainly have been instances (as in the cases of *Carversham* and *Kingston Bridge*,) where the Court has suspended the effect of a former verdict, when great injustice would arise from precluding farther discussion. In the *Kingston Bridge* case, if we had not adopted this rule, the county of Middlesex would have been fixed with the repair of the bridge, though it appeared upon the evidence that other persons were bound. So in this case, it seems to me, that to maintain the present verdict would be to send the parties to a second trial, with a millstone *about their neck, the weight of which it would be impossible to resist. If this question had depended merely on the evidence of user of the road as a highway, and there had been no circumstances drawn from the acts of the parish, I should have been extremely unwilling to have granted the indulgence prayed ; but to refuse it here would be injustice to the parties, inasmuch as there is evidence both of the user of it as a highway. (in the instances of gravel carried over it for the repair of other

[*66]

preceded it, and was first tried. Upon that trial there was evidence that the corporation was liable ; but it turned out that the bailiffs were officers of comparatively modern creation, and that they, therefore, could not be immemorially bound to repair. Upon that indictment the defendants were, therefore, acquitted ; and *The King v. Middlesex* being then called on, the defendants' counsel found that the same fact which occasioned the acquittal in the last case, i.e. that the bailiffs and freemen were charged to be liable, must equally render it impossible for them to support the plea. The consequence was, that a verdict of guilty passed against the defendants ; and if judgment had

been entered on this verdict, the county of Middlesex would have been subjected to the expense of repairing this bridge, till the result of another indictment against the corporation of Kingston was ascertained. The Court, therefore, on the motion of *Gurney*, in the following Michaelmas Term, granted a rule nisi for suspending the entry of judgment (another bill of indictment having in the intermediate time been preferred and found against the corporation of Kingston), until that indictment could be tried : that rule was afterwards made absolute, and upon the trial of this second indictment the corporation were found guilty.

highways in the parish,) and of repairs by the parish; because, if the repairs are done by a parishioner under an agreement with the parish, in consideration of his being excused his statute duty, that is virtually a repair by the parish. There are, therefore, circumstances which differ this from ordinary cases, and make it a case fit to be tried again. By staying the proceedings, we do in effect give the parties the benefit of an ulterior consideration. But, inasmuch as this is an indulgence, we shall impose it as a term that the parishioners of Wandsworth, (whose testimony would not be legal evidence, on the ground of interest,) shall be examined at the next trial; and this rule shall only, therefore, be made absolute upon the terms of the prosecutor consenting to that effect.

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BAYLEY, J. concurred.

ABBOTT, J. :

This is a question in which the public are interested; and, as there are circumstances in the case that require farther investigation, I think it is both convenient and just that the prosecutor should have an opportunity of presenting this case to another *jury, without the prejudice of a judgment against him.

[*67]

HOLROYD, J. concurred.

Rule absolute.†

† *REX v. THE INHABITANTS OF CHIGWELL.*

(1 Barn. & Ald. 67, n.)

Jessopp, within the first four days of this Term, applied for a similar rule in this case, which was an indictment for not repairing a road, tried before Dallas, J. at the last Assizes for the county of Essex; and he cited the foregoing case, *Rex v. Wandsworth*. Lord ELLENBOROUGH, Ch. J. on the motion, desired that a

case, in which the rule was granted under very special circumstances, should not be drawn into a precedent; that if it were, it would enable parties to defeat the operation of a well-established rule; the Court would, however, in this instance, refer to the learned Judge who tried the cause; and afterwards, on a subsequent day in this Term, *Jessopp* was informed that they had done so, and the result of their inquiries led them to refuse the rule.

1817.
Nov. 8.

TRELAWNEY v. COLEMAN.

(1 Barn. & Ald. 90—92.)

[90]

In an action for adultery,† letters written by the wife to the husband (while living apart from each other), proved to have been written at the time they bore date, and when there was no reason to suspect collusion, are admissible evidence, without shewing distinctly the cause of their living apart.

IN an action for adultery, tried before Holroyd, J. at the Middlesex sittings after last Term, letters from the wife to the husband (while apart from each other) were offered in evidence by the plaintiff to shew that they lived on terms of mutual affection. It appeared that they had been separated for six months only, and they had lived together some months before the wife became acquainted with the defendant. The plaintiff had been a midshipman in the navy, and was a man in slender circumstances. The letters were proved to have been written at the time they bore date, and long before the wife was suspected of adultery, or was even acquainted with the defendant: but no direct evidence was given as to the cause of their living separate when the letters were written: and *Gurney* objected that they could not be received. But HOLROYD, J. permitted them to be read, and the plaintiff had a verdict.

Gurney now moved for rule *nisi* for a new trial, on the ground of these letters having been improperly received in evidence; and he contended that they ought not to have been read until the cause of the husband and wife living apart distinctly appeared. In the only case where such evidence was received, *Edwards v. Crock*,‡ the parties lived as servants in different families, and were therefore necessarily separated from each other: in this case, their separation is unaccounted for.

[91] LORD ELLENBOROUGH, Ch. J. :

I have no doubt that these letters were admissible evidence. What the husband and wife say to each other is, beyond all question, evidence to show their demeanor and conduct, whether

† See now 20 & 21 Vict. c. 85, s. 33.—R. C.

‡ 4 Esp. 39.

they were living on better or worse terms : what they write to each other may be liable to suspicion ; but when that is cleared up, that ground of objection fails : that was satisfactorily explained in the present case by proof of the letters being written at the time they bore date, and long before any suspicion of the wife's misconduct.

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v.
COLEMAN.

BAYLEY, J. :

I think these letters were properly received : when it is once established that the manner in which the husband and wife conduct themselves towards each other (when together), is admissible evidence ; it follows that letters, which in absence afford the only means of shewing their manner of conducting themselves towards each other, are also admissible. There may indeed, in letters, be an assumed affection, which does not actually exist ; but the behaviour of the parties themselves is open to the same objection ; for they may (when together) assume an appearance of affection which has not any foundation in truth and sincerity. As to these letters, there is nothing to raise any suspicion of collusion, for they are proved to have been written at the time when they bear date, and long before any suspicion of the adulterous intercourse.

ABBOTT, J. :

There was very sufficient proof in this case, that the letters were written at the time they bore date, and when no suspicion was entertained of the wife's misconduct ; and that being established, I think *they were properly received to shew that the husband and wife were living upon good terms.

[*92]

HOLROYD, J. concurred.

Rule refused.

1817.
Nov. 8.

HURST v. PARKER.

(1 Barn. & Ald. 92—94.)

[92]

Trespass for breaking and entering coal-mines and taking away coals. Plea, *actio non accrevit infra sex annos*. To which the plaintiff replied in the affirmative. At the trial no evidence was given to shew that the trespass was actually committed within six years: Held, that evidence of a promise to make compensation, made by defendant before the commencement of the action, and when he was threatened with an action for taking away coals, was not sufficient to support this issue; by which the plaintiff was bound to prove the affirmative, that he had a good cause of action within six years before the commencement of the suit.

TRESPASS for breaking and entering certain coal-mines, and carrying away coals. 1st Plea, not guilty; 2nd, *actio non accrevit infra sex annos*.

At the trial before Garrow, B. at the last assizes for the county of Salop, it appeared that the plaintiff and defendant were owners of adjoining lands and coal-mines; that the plaintiff having recently commenced working her mines, had discovered that the defendant had encroached upon her property, and had carried away considerable quantities of her coals. The defendant had for many years (certainly exceeding six) been in the constant habit of extracting coals from his mines. No distinct evidence was given as to the time when the trespass was committed by the defendant. It was proved, however, that before the commencement of the action the plaintiff applied to the defendant for a compensation for the coals so taken away by him or his workmen, and threatened in case of refusal to commence an action; and that the defendant then promised he would make a proper compensation. On his failing *to do this, the present action was brought. It was insisted at the trial, that this amounted to an acknowledgment of the cause of action within six years, sufficient to take the case out of the Statute of Limitations; but the learned Judge thought that it was only evidence of a cause of action subsisting at the time that the promise was made, and not at the time of the commencement of the suit; and the plaintiff was therefore nonsuited.

[*93]

Richardson now moved for a new trial, and contended that

the promise of compensation being made under threat of an action must be taken as an admission that there was then a good subsisting cause of action; and he cited the cases of *Hyeling v. Hastings*,† and *Leaper v. Tatton*,‡ to shew that a promise to pay created a fresh cause of action, and that at all events it ought to have been left to the jury to say upon the evidence whether the trespass were committed within six years or not.

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v.
PARKER.

LORD ELLENBOROUGH, Ch. J. :

Those were actions of assumpsit, where an acknowledgment of the debt is evidence of a fresh promise; but this is an action of trespass for an injury done to the plaintiff's property. The only question is, on whom is the issue? Now the affirmative of the issue is on the plaintiff, who says that the cause of action did accrue within six years; but what proof is there that it did accrue within that time? The plaintiff has only made out that the defendant acknowledged, within six years before the *com-
[*94]
mencement of the action, a liability; and it is admitted that there was no promise afterwards made: he has failed therefore in proving, that the cause of action accrued within six years before the suing out of the writ; and I therefore think the nonsuit was perfectly right.

BAYLEY, J. :

I think that there was no acknowledgment of a trespass committed within six years before commencement of the suit.

ABBOTT, J. :

The utmost effect of the acknowledgment is that the plaintiff had a cause of action at that time, but he was bound to prove that he had a cause of action at a subsequent time, *i.e.* when the suit was commenced: that he has failed in proving.

HOLROYD, J. :

By the form of the pleadings the *onus probandi* lies on the plaintiff: he has taken upon himself to prove that a trespass was committed within six years next before the commencement of this action; and he has failed in such proof.

Rule refused.

† *Ld. Raym.* 422.

‡ *16 East*, 420.

1817.
Nov. 11.

GRAY v. GWENNAP.

(1 Barn. & Ald. 106—108.)

[106]

Upon the trial of an action of tort a verdict was found for the plaintiff, subject to a reference of all matters in difference. The defendant claimed before the arbitrator a sum of money due to him upon the balance of an account, which was admitted by the plaintiff to be due. The award, without stating that it was made of and concerning the premises, directed a verdict to be entered for the plaintiff, with damages: Held, that this award was sufficient.

AN action on the case in the nature of deceit, to which the defendant pleaded not guilty, coming on to be tried at Nisi Prius, a verdict was found for the plaintiff, for the damages laid in the declaration, subject to a reference.

[107]

By the order of Nisi Prius, all matters in difference between the parties in the cause were referred to the arbitrator, who, by his award, after reciting the order, directed a verdict to be entered for the plaintiff, with 2,224*l.* damages, without stating that he made his award of and concerning the premises. By affidavit it now appeared that the cause in which the order of Nisi Prius was made was merely an action founded in tort, and that before the action the plaintiff was indebted to the defendant in the sum of 200*l.* upon the balance of an account, which was the subject of enquiry before the arbitrator, and admitted by the plaintiff to be due.

Selwyn now moved for a rule *nisi* to set aside the award, and contended that the arbitrator having all matters referred to him had made his award as to one only, viz. that which was the subject-matter of the action, and having had the balance of account expressly brought before him, he ought to have included that also: there was therefore a matter referred on which there was no arbitrament, and consequently the award was void: and he cited *Randall v. Randall*.†

(BAYLEY, J.: Does not the award mean that the whole sum due is 2,224*l.*, after settling all accounts between the parties?)

† 8 R. R. 601 (7 East, 81).

There is nothing on the face of the award to shew that the arbitrator has decided anything beyond the subject-matter of the action; for he has not awarded "of and concerning the premises." If he had so done, it might perhaps be intended that he had determined all the matters submitted to him. But the present award only assesses damages to the plaintiff for the injury sustained *in that action where the debt due to defendant could not have been the subject of set-off: and when the postea is delivered to plaintiff, he may enter up his judgment for the whole sum awarded in that action; and upon the record it will appear that such damages were assessed for the consequences of the wrongful act complained of in the declaration in that cause, that is, in a cause where the defendant, by the form of the action, was precluded from availing himself of a set-off. And if the defendant were now to bring his action for the 200*l.*, that judgment would certainly be no bar, and the award goes no farther than to enable plaintiff to enter up judgment and sue out execution in that suit, and does not adjudicate on any other matter; it is therefore void, not having decided all (but only one) of the matters referred.

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v.
GWENNAP.

[*108]

LORD ELLENBOROUGH, Ch. J.:

I think that it sufficiently appears from the award that the arbitrator has decided concerning all the matters referred to him, by ordering a verdict to be entered for the plaintiff in the action. That he may have done so is perfectly clear, and if he had used in the award the words *de premissis*, there would be no doubt on the subject. The award recites, that all matters in difference were referred, and the arbitrator then awards a general verdict for the plaintiff, damages 2,224*l.*; the fair meaning of which is, that he found that sum due after settling all accounts between the parties.

Per CURIAM :

Rule refused.

1817.
Nov. 15.

DENBY *v.* MOORE.†

(1 Barn. & Ald. 123—131.)

[123]

An occupier of lands having, during a course of twelve years, paid to the collector of taxes the landlord's property-tax, and the full rent as it became due to the landlord, without claiming any deduction on account of the tax so paid: Held, that the occupier could not recover back from the landlord any part of the property-tax so paid.

[*124]

ASSUMPSIT for money had and received. Pleas, first, the general issue, and secondly, the Statute of Limitations. At the trial before Bayley, J., at the last Summer Assizes for the county of York, it appeared in evidence, that the plaintiff for ten years before, and also upon the 8th day of March, 1816, had been, and was occupier *of a messuage and farm, situate at Cowick, in the parish of Snaith in the county of York, and rated to the property-tax for the same. Although the plaintiff occupied the farm, one George Craven, the father-in-law of the plaintiff, was the tenant to the defendant, but the plaintiff paid the rent for some years before Craven's death, which happened in November, 1812; though defendant would not allow him as his tenant, but would only give receipts to Craven. After Craven's death, plaintiff, who was his executor, paid the rent until the 2nd February, 1815, when plaintiff and defendant agreed for the farm on a tenancy, under which plaintiff himself was to be tenant to the defendant. The defendant received the full amount of his rent from the hands of the plaintiff, as and when the same became due, for the said premises so situate in Cowick aforesaid, without deducting or allowing for the landlord's property-tax charged upon the same, although the same had been and was duly paid by the plaintiff as such occupier, to the proper collector thereof in that behalf appointed, from time to time as the same became due, up to the end of the assessment in 1814.

No demand of, or application or request for the said property-tax, to be paid or allowed or deducted out of the rent, was ever made at the time of payment of any rent as aforesaid, nor was any receipts from any collector ever produced, but the same was

† See, as a parallel case under the modern Act, 5 & 6 Vict. c. 35, *Lamb v. Brewster* (1879) 4 Q. B. D. 220, 607; 48 L. J. Q. B. 421.—R. C.

paid to the defendant until the 13th March, 1816. On the 18th March, 1816, the plaintiff paid to the defendant 112*l.* 10*s.* for half a year's rent which had become due on the 2nd February, 1816; and at the same time demanded *the landlord's property-tax for the said premises for the last twelve years, and afterwards for the last six years, but did not then or at any other time produce any collector's receipt for the same, and that the defendant then and there refused to repay or allow the same or any part thereof, saying at the same time, that he never had allowed, nor ever would allow any property-tax, and the full rent without any deduction for property-tax was then paid; but the defendant afterwards offered to pay the plaintiff the property-tax for the rent of 112*l.* 10*s.* then payable.

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v.
MOORE.

[*123]

On the 17th February, 1815, the plaintiff and defendant settled all accounts then subsisting between them, and the defendant then paid to the plaintiff 106*l.* 9*s.* 1*d.*, and the plaintiff then said to him, "Now you and I have settled all accounts, both as executor and on your own account, and there is nothing more between us." Defendant said, "Yes." The plaintiff proved no assessments later than for 1814. The plaintiff was the collector of the property-tax for the district in which the premises are situate for two years preceding 1814. The jury gave a verdict for the plaintiff, damages 66*l.*, subject to the opinion of the Court, whether the plaintiff was entitled to recover for any part of the claim. If the Court shall be of opinion that the plaintiff is entitled to recover for the whole twelve years, then the present verdict to stand; if only for six years, then the verdict to be reduced to 43*l.* 11*s.* 9*d.*; if they shall be of opinion that the plaintiff is not entitled to recover anything, then a nonsuit to be entered.

[After argument, in which the Act 46 Geo. III. c. 65, Sched. A. No. 4, rule 9, was relied on by the defendant:]

LORD ELLENBOROUGH, Ch. J.:

[123]

I think in this case the action is not maintainable. The plaintiff was certainly warranted in the payment which he at first made in redemption of his goods, which, but for such

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v.
MOORE.

payment, might have been distrained upon. But when he went with the money for the purpose of paying to his landlord the next rent which became due he ought to have then made the deduction. This, however, he did not choose to do, but paid the sum of 10*l.* more than was necessary. It was therefore *quoad* that sum a voluntary payment on his part. It does not appear what might be the reasons which induced him so to act, but it was a voluntary payment. Whether the transaction between him and the landlord was fraudulent with respect to the property-tax is perhaps not clear. I, however, go on its being a voluntary payment, and I know of no principle of law which gives him a right to recover back money so paid. It was his own voluntary act which placed him in the situation in which he now stands.

BAYLEY, J. :

[*129]

On the discussion I am satisfied that this action cannot be maintained. The payment was made at a time when it was in the tenant's power to have deducted the sum in question. He must have known that he had a right so to deduct it. Knowing this, he chooses nevertheless to make this payment. Then that is a voluntary payment which he cannot recover back by this action. But I think also, that he cannot recover for another reason. This was a fraud on the Property-tax Act. If the tenant had insisted on deducting the tax from the next rent that became due, the landlord might and probably would have raised the *rent. And it seems to me, that the clause in the Act of Parliament enabling the tenant so to deduct it was framed with this very view, viz. that the most improved rent for the land might thus be obtained, and be the sum on which the tax is payable; but if the tenant be allowed not to deduct immediately, but to go on paying for many years, and then to call on the landlord to repay him altogether, that will have a tendency to defraud the revenue. The tenant will thereby have a great advantage. If he does not as in the case before the Court, deduct the 10*l.*, it is an admission on his part, that the land which is let to him for 100*l.* is worth 110*l.* But if so, the Government ought to have received 11*l.* per annum, and not 10*l.*

which they have done. And therefore on this ground also, I think this action not maintainable.

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v.
MOORE.

ABBOTT, J. :

The intention of the Legislature was, that this tax should fall entirely on the landlord, and the Act provides, that the tenant at the first payment shall have an opportunity of deducting the amount of the tax he had so paid for his landlord, and to prevent his being oppressed by the landlord, the latter is subject, by section 115,† to very heavy penalties in case of refusal; and all contracts made for payment of the rent in full, without allowing such deduction, are utterly void. As soon therefore as the tenant has paid the property-tax, I consider it in effect as a payment by him of so much of the next rent due by him to his landlord. But if it had been the intention of the Legislature that a tenant should go on for years paying the tax without claiming any deduction from the landlord, and then be permitted to deduct the whole amount at once, I cannot *help thinking there would have been found in the Property-tax Act some clause to that effect. The case then stands thus : either the tenant must be considered as having given so much money to his landlord; and if it be so, then he cannot recover back money which he has so parted with; or he must be taken to admit, that the rent he paid for the land was less than the value which he ought to have paid, and then he would be a party to a fraud on the Government in paying less property-tax than he ought. I therefore think he cannot recover in this action. I do not say, however, that the clause giving the power of deduction takes away all other remedies. There may be cases suggested in which a tenant might recover, as if he had not his property-tax receipts with him at the time when he makes the next payment of rent, and the landlord, on being applied to immediately afterwards, should refuse to pay back the money.

[*180]

HOLROYD, J. :

This action cannot be supported : if it could, it would counter-vail the provisions of the Property-tax Act. The tax of two shillings in the pound is laid on the property of the landlord.

† Corresponding to s. 103 of the Act 5 & 6 Vict. c. 35.—R. C.

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v.
MOORE.

The effect of enabling the plaintiff to recover in this action would be to throw that tax on the occupier. This is an action for money had and received. The first payment of the tax by the occupier is a lawful payment: he had a right to pay it in the first instance, and needed not to wait till his property had been distrained upon before he did so. The statute directs that the tenant shall deduct the money from his next rent. Then that money is as so much rent already paid to the landlord. If the tenant afterwards chooses to pay the whole rent, it must be a *voluntary payment on his part as to the portion paid by him before. I therefore think that being a voluntary payment he cannot recover it back by this form of action.

[*131]

Judgment of nonsuit.

1817.
Nov. 18.

LEAR v. EDMONDS.†

(1 Barn. & Ald. 137—139; S. C. s. n. *Deare v. Edmunds*, 2 Chitty, 301.)

[157]

Action for use and occupation. Plea, that plaintiff, before action, took and detained, as a distress for the rent, goods of value sufficient to satisfy the same: Held, on special demurrer, that this plea was bad, for not shewing that the rent was satisfied.

ACTION for use and occupation. Plea, that defendant, for the space of time in the declaration mentioned, used and occupied the premises by virtue of a demise thereof to him made at the yearly rent of 70*l.*, payable quarterly; and thereby, before the commencement of this suit, became indebted to plaintiff in 52*l.* 10*s.* of the rent aforesaid, being the same identical sum of money sought to be recovered by the plaintiff, and that being so indebted, they the plaintiffs, before the commencement of this suit, took and detained, as a distress for the rent so due, goods of the defendant of value sufficient to satisfy the said rent, and the costs of distress. Demurrer, assigning for cause that the plea did not shew that the rent was satisfied by the distress.

Laues, in support of the demurrer :

Although goods of value sufficient to satisfy the rent be seized

† See this case commented on in *v. Philpott* (1875) L. R. 10 Ex. 242, the judgment of the Court in *Lchain* 249; 44 L. J. Ex. 225, 229.—R. C.

under the distress, it does not thence necessarily follow that the rent was satisfied, for the distress may be rescued, or the plaintiff may abandon it. The defendant hath not by his plea shewn that the rent was satisfied: the distress *may or may not operate as satisfaction: whether it did or not, which it is essential the plea should disclose, is left in uncertainty; and as that fact must be within the defendant's knowledge, the plea is bad. And he referred to Rastall's Entries,† to shew that the usual mode of pleading in such cases, was to state that the rent itself was levied by the distress.

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v.
EDMONDS.

[*158]

Platt, contra:

It is sufficient in the first instance to state that goods of sufficient value were taken under a distress for rent, for it must be inferred that the rent was thence satisfied, the goods being taken for that purpose. It is possible, indeed, that that may not be the case: the plaintiff may however shew that in his replication. In *Robinson v. Cleyton*,‡ to *scire facias* to have execution upon a judgment in a debt, the defendant pleaded that the plaintiff had before taken him in execution upon a *ca. sa.*; the plaintiff replied, that though he did take defendant upon the *ca. sa.*, he rescued himself and escaped. Defendant demurred, and the replication was held good. This is an authority, therefore, that the plaintiff might have replied that the rent was not satisfied. A distress, since the statute 2 W. & M. sess. 1, c. 5, s. 2, is become an execution defeazable in five days.

LORD ELLENBOROUGH, Ch. J.:

The distress may enure as a satisfaction, or may constitute an injury: if the former, then the defendant ought to have pleaded those circumstances which would make it operate as satisfaction; for it is incomplete as satisfaction, by the mere act of seizure.

BAYLEY, J.:

[159]

The language of the statute of W. & M. is, that the person distraining *may* sell the goods, not that he *must* sell; if so, then

† P. 175 a, edit. 1596.

‡ Cro. Car. 240.

LEAR
v.
EDMONDA.

does he not stand as he did at common law, before the statute ; for it is not averred that the goods distrained were sold. It was the duty of the defendant in his plea to set out the whole of his case : the facts were within his knowledge ; and they may fairly be presumed not to have existed, inasmuch as they are not stated.

ABBOTT, J. :

It is not even averred that the goods were liable to the distress : but supposing the goods liable, one of three things must have happened ; either they must have been sold, or they must have been detained until this time, or they must have been relinquished. If the goods have been relinquished at the request of the party, then the distress would not operate as a bar. As to the case cited, that does not apply : there the plea shewed that the debt was satisfied by taking the body in execution under the *ca. sa.* ; but the mere detaining of goods is not a satisfaction.

HOLROYD, J., concurred.

Judgment for plaintiff.

1817.
Nov. 18.

HARVEY v. JACOB.†

(1 Barn. & Ald. 159—161.)

[159]

Where the plaintiff, after issue joined, has been convicted of felony, and received sentence of transportation, the Court will compel him or his attorney to give security for costs retrospective and prospective.

[*160]

TINDAL, on last Friday, had obtained a rule, calling on the plaintiff to shew cause why the plaintiff, or his attorney, should not give security for *costs, and in the mean time all proceedings be stayed. The affidavit in support of the rule stated, that since issue joined, plaintiff had been tried at the last Old Bailey sessions for a felony, for having in his possession forged bank-notes, knowing them to be forged, and was found guilty, and had received sentence of transportation, and was now on board a

† Followed in *Brocklebank v. The King's Lynn S. S. Co.* (1878) 3 C. P. D. 365, 367 ; 47 L. J. C. P. 321.—R. C.

vessel at Portsmouth, preparatory to his transportation. Notice of trial had been given for the second sittings in this Term on Wednesday last, and application had been made to plaintiffs to give security, which they refused.

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Scarlett and *Comyn* now shewed cause, and said this application might have been made at an earlier period to a Judge at chambers, and referred to *Tullock v. Crowley*,† and an anonymous‡ case in C. B., T. 49 Geo. III., to shew that the Court of Common Pleas would not compel security for costs where plaintiff was a prisoner of war in France, a bankrupt, or a prisoner in Newgate.

Tindal in support of the rule, *contra*, said, that the application had been made as early as possible. If an Englishman leaves the country after issue joined, he must give security for costs: in this case, if there is a verdict for the defendant, it will be impossible for him to obtain his costs, for the property of the plaintiff is forfeited to the Crown, and his person will be out of the reach of the process of the Court. If the attorney has a lien, he may give security; and he cited *Barker v. Hargreave*.§

LORD ELLENBOROUGH, Ch. J.:

If the attorney has sufficient interest in this action to go on with it, he may *find the security. If the defendant proceeds without such security, he will be in as bad a situation as if the plaintiff had been an uncertificated bankrupt. It had occurred to me, that as the plaintiff's property will belong to the Crown, the Crown might have been applied to, but probably such an application would have been fruitless.

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BAYLEY, J.:

This application has been made as soon as possible. It is as if in the course of a cause a party becomes insolvent.

Scarlett then suggested that security should be given for prospective costs only, but the Court observed that they were

† 1 Taunt. 18.

‡ 11 R. R. 526 (2 Taunt. 61).

§ 6 T. R. 597.

HARVEY not aware of any instance of costs being apportioned into pro-
 v. spective and retrospective; that assignees of bankrupt in similar
 JACOB. cases give security for all costs, and therefore the security in
 this case must be for all costs.

Rule absolute.

1817.
 Nov. 22.
 —
 [178]

THE KING v. THE INHABITANTS OF THE PARISH
 OF STOKE GOLDING, IN THE COUNTY OF LEICESTER.

(1 Barn. & Ald. 173—178.)

The legal custody of an instrument appointing an overseer is in that officer; and in the absence of proof that the parish authorities have the actual custody of the document, notice to them to produce it is not sufficient to admit secondary evidence without calling the overseer himself.

[*174] UPON appeal, the quarter sessions for the county of Leicester quashed an order of justices for the removal of Joseph Underwood, Sarah his wife, and their *two children, from Stoke Golding to Oddestone, subject to the opinion of this Court on the following case:

Joseph Underwood, his wife, and two children, were removed from Stoke Golding in the county of Leicester, to Oddestone in the same county. On appeal against the orders, the birth of the pauper at Oddestone was proved. The appellants then put in an indenture of apprenticeship, by which the pauper was bound by the parish of Oddestone, in 1797, to Francis Chamberlain of Stoke Golding, and under which he served six years and a half. To this indenture the respondents objected, that it was signed by one churchwarden and one overseer only: and to shew that only one overseer had been appointed for the year in which the indenture was executed, they called for the appointments of overseers, having before given the appellants notice to produce all vestry books and writings in their custody or power touching the appointments of overseers of the poor for the parish of Oddestone, and particularly the appointments of the overseers for the years 1796, 1797, and 1798. One parish book was produced; it did not apply to the year 1797. That was the only book in existence. The parish officer who produced it swore that no

appointments were kept.. The respondents then called a witness who had lived in Oddestone seventeen years, including the year 1797, and had served the office of overseer five or six times. He said, there was only one overseer in those years, and never was more than one overseer. To this it was objected, that the appointments being in writing, parol evidence could not be admitted. The Court were of this opinion.

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Gurney, Phillipps, and Dwarries, in support of the order of sessions, contended that the sessions were right in rejecting the parol evidence. The appointment of the overseer was in writing, and that ought to be produced if in existence. Notice was indeed given to the parish officers of Oddestone to produce it: but in the ordinary course of things the original instrument could not be in their possession, but in the possession of the overseer who derived his authority under it; and for the justification of whose acts it would be necessary: that person is not subpœnaed. The original instrument (for any thing that appeared) may therefore be in existence, and then ought to have been produced, and the secondary evidence is not admissible.

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Nolan, Beauclerk, and Marriott, contra, contended that they had done all that was necessary to entitle them to give the secondary evidence; that the parish having so great an interest in these appointments, ought to have had the custody of them: they had notice to produce them, and it was proved that they had none such in their possession. The written appointment must therefore be taken not to be in existence, and the sessions in that case ought to have received the parol evidence.

LORD ELLENBOROUGH, Ch. J.:

The question is, whether the justices below have done wrong in rejecting the parol evidence. This is clear, that the parol evidence could not be admitted until the case was ripe for the admission of secondary evidence; now it could not be considered as ripe for that purpose, until the parish of Stoke Golding had exhausted all the proper means of *procuring the primary evidence. Have they done this? First, as to the appointment

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itself, they gave a notice to the parish, and supposing the parish had the actual custody, that notice would have been sufficient; but that does not appear. Have they then the legal custody? Certainly not, for the legal custody is in the officer who is the person most interested in the instrument, and who requires its production as a sanction for those acts which he may be called upon to do under its authority. Now here there has not been any notice to the overseer himself. They were certain of him, and through him they might have made their way to procuring all the others, if more than one had been appointed. I think, therefore, that as in this case there has been an omission of the means of exhausting the primary evidence, recourse could not be had to that of a secondary nature, and therefore, I cannot feel, or satisfy myself, that the sessions have not done right in rejecting it.

BAYLEY, J.:

The party here had not entitled themselves to go into the secondary evidence. This is a removal from Stoke Golding to Oddestone; Stoke Golding relies on a birth settlement, in answer to which the other party set up a service under an indenture in Stoke Golding: that indenture purports to be signed by one overseer only; that will do, unless it appear that more than one was appointed. One overseer is named, he is not called, how is the Court to know, whether more than one has been appointed? For that purpose, they must look at the appointment itself; that ought to be in the possession of the party to whom it was given, for whom, and whose acts, it was to be a justification; they ought to *have applied to him; if he had been called, or if they had been entitled to give his conduct in evidence, that might have done; it would not have been necessary to have called in aid the stat. 54 Geo. III. c. 170, because *non constat* that the overseer of the year 1797, was overseer then, and one of the parties to the appeal. If the appointment had been produced, and on the face of that, it had appeared that only one overseer had been appointed, that might have thrown the proof on the other side. In the absence of any proof of this kind, it seems to me, that the secondary evidence was not admissible.

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ABBOTT, J. :

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I am of the same opinion. The material question at the hearing of this appeal, was, whether in the year 1797, one person had been appointed overseer, or more than one ; it was for the interest of Stoke Golding to contend that only one had been appointed. As the Act requires more than one, the Court must presume that the Act has been complied with. The sessions, therefore, were justified in presuming that there were more than one, unless Stoke Golding shewed that only one had been appointed. The ordinary proof of this is the appointment itself ; that is not produced, and the question is, whether Stoke Golding have done enough to dispense with its production ; the step they took was to give notice to the parish officers to produce it. Now the appointment is not kept in the parish-chest ; the fact, as it appears, is, that it is never kept there. I think, therefore, that the notice was not sufficient ; they might have applied to the one overseer ; but they did not take any step to that effect : whether he was living or dead, or where he was residing, if living, does not appear. It *seems to me, therefore, that the parish of Stoke Golding have not taken such measures as were necessary in order to let in the secondary evidence.

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HOLROYD, J. :

The law presumes the appointment to be in the custody of some of the overseers, who are responsible for all the acts done under it ; notice therefore should have been given to the party in whose custody the law places the appointment ; that has not been done : the decision of the Sessions therefore was right.

Order of Sessions confirmed.



1817.
Nov. 25.

[182]

HENNELL *v.* CHARLES LYON, ADMINISTRATOR,
WITH THE WILL ANNEXED, OF MARY LYON,
DECEASED.

(1 Barn. & Ald. 182—189.)

Upon a plea of *plene administravit*, plaintiff, in order to shew assets, gave in evidence a copy of a bill, and answer, purporting to be an answer by a person of the same name, and sustaining the same character as the defendant: Held, that the copy was admissible, and that on the face of it there was presumptive evidence of identity; the defendant not having shewn any circumstances to rebut the presumption.

ASSUMPSIT for goods sold by plaintiffs to intestate. Plea, 1. *Non assumpsit*. 2. *Plene administravit*. At the trial before Abbott, J. at the London sittings, plaintiff having proved the goods sold, in order to shew assets in hand of the defendant as administrator, produced an examined copy of a bill, and an answer, purporting to be an answer by Charles Lyon to a bill filed in Chancery against him in his character of administrator of Mary Lyon. The bill was filed by Messrs. Maltby & Co. as well on their own behalf as on that of all other creditors, praying an account. The plaintiff in this action was not a party to that suit. It was objected, that that was insufficient evidence, for it was *res inter alios acta*: that the plaintiff should have produced the original answer, and verified the handwriting, or he should have shewn that this defendant was the defendant in that suit: that in the absence of such evidence there was no proof of identity. The learned Judge, however, received the evidence, and the jury found a verdict for the plaintiff.

Walton having obtained a rule *nisi* for setting aside that verdict, and entering a nonsuit,

[After argument:]

[184] LORD ELLENBOROUGH, Ch. J.:

The admission of copies in evidence is founded upon a principle of public convenience, in order that documents of great moment

[*185] *should not be ambulatory, and subject to the loss that would

be incurred if they were removable. The same has been laid down in respect of proceedings in Courts, not of record, copies whereof are admitted, though not strictly of a public nature. In all these cases it may be laid down as a general principle, that copies should be received. In this case, the answer being a proceeding in a court of justice, must have been received there in the usual course, and verified by the person putting it in, as the answer of the person sustaining the character which it imports him to bear; and there is no question here, as to that answer having been put in by a person bearing that name and character. But it is said, that the evidence wants a farther link to connect it with the defendant, and that it ought to be shewn that the Charles Lyon in the answer is the present litigant. I do not know any way by which that circumstance can be supplied, but by the description in the answer itself, which tallies in almost every particular. Still, however, it may be shewn that he is not the same person. The question then is, whether public convenience requires that the proof should be given by the plaintiff or the defendant; and I rather think that public convenience is in favour of the admissibility of this proof, giving the other party an opportunity of shewing that he was not the individual named in the answer. It should be taken as proof that he is the person named in the answer, until the contrary be shewn. I do not say that it is conclusive, but that it is *primâ facie* evidence. I confess, however, that this case forms a sort of anomaly; but expediency requires that the evidence should be admitted: and such appears to have been the general practice, except in criminal cases. Wishing that the *rules laid down in the administration of justice should accord with public convenience, I do not feel inclined to disturb the practice, although I do not see clearly the reason upon which the distinction between civil and criminal proceedings, as to the admissibility of this evidence, has obtained.

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BAYLEY, J. :

The bill and answer being proceedings in a court of justice, it is of the utmost importance, that the originals should be preserved; and great inconvenience would result if they were

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moved about from place to place; and indeed they might be wanted in more than one place at the same time. On this ground, therefore, such proceedings are provable by examined copies. Then the question is, whether the copy of the answer in this case was sufficient, or whether the identity should not also have been proved; but I think that it did afford *primâ facie* evidence, to shew that the defendant was the same person. The suit at law is against Charles Lyon as the administrator of Mary Lyon, and the bill in equity is against Charles Lyon as the administrator of Mary Lyon. I take it for granted, the bill would describe him by his place and addition; that would also be another circumstance to shew identity. Now it would be impertinent for any other person but Charles Lyon to put in an answer to such a bill. We may therefore fairly presume, that the answer was put in by Charles Lyon, and we may fairly conclude that it was the same Charles Lyon, for it was open to the defendant, to have shewn that there was another Charles Lyon. But in the absence of any such rebutting proof, the evidence given was *primâ facie* evidence of identity, and if that is once established, there is an end of the case.

[187] ABBOTT, J. :

I entertained some doubts at the trial, as to the admissibility of this evidence; but I thought it better to receive it, and upon the discussion and the authority of *Lady Dartmouth v. Roberts*,† I think the evidence was properly received. It is a general principle, that copies are receivable in such cases without the originals, from the great inconvenience which would result, if the documents were taken to different places. There would have been a danger of loss from such a practice, and besides, the documents might be wanted at different places at the same time. The objection is, that the answer ought not to have been received, because it was not shewn that the defendant putting in the answer was the identical defendant on this record; but in order to ascertain that, let us look at the pleadings in this and that suit. In this, he is sued as the administrator of Mary Lyon, and he does not plead that he is not the administrator; he therefore

† 16 East, 334.

admits that to be the character which he sustains. Then we find upon the proceedings in Chancery, a bill filed against Charles Lyon, administrator of Mary Lyon, and an answer put in by C. Lyon, in that character : now if the party to the suit in Chancery is not the defendant, then there are two persons, each of whom is administrator of a Mary Lyon. There is nothing to shew two administrations, and it is rather extraordinary to suppose that two persons of the same name should sustain the same character. It is not to be presumed that there are two persons, but the identity is rather to be presumed, unless the plaintiff could have shewn the contrary. In this case, however, there was no evidence given on the part of the defendant, *to rebut the presumption of identity; and therefore I think it was sufficiently established.

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HOLROYD, J. :

I am of the same opinion, that the copy of the bill and answer was properly received. It has been holden from the time of HOLT, Ch. J., that where the original itself is evidence, the immediate copy of the original is also evidence. In *Hoe v. Nathorp*,† this principle is laid down; and it is there stated, that the copy of a church register and the copy of a probate of a will, concerning the personalty, is good evidence; but that the copy of a probate of a will, as to the realty, is not evidence, because the probate itself is not evidence in such a case. That being so, if the original bill and answer would be evidence, a copy would equally be evidence, without the original bill and answer, so far as the original bill and answer would be evidence, without farther proof; here I think the original answer would have been evidence; the Court having jurisdiction, it must be taken as the answer of the person against whom the bill was filed; if received in that Court as the answer of the person who was the defendant there, then it may be read here, in order to see whether it applies to the present case. If then the original would have been evidence, an examined copy stands in the same situation, according to the authority in Lord Raymond. Then how does the question stand? The person sued here is Charles Lyon, sued as

† 1 Ld. Raym. 154.

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administrator of Mary Lyon, and the copy of the answer shews that the bill was filed against Charles Lyon, as administrator of Mary Lyon. There is therefore *prima facie* evidence *that the Charles Lyon in that Court and in this, are the same person, which is the only identity wanted. In *Cameron v. Lightfoot*,† in order to prove some of the facts, an affidavit made by the defendant was given in evidence, without proof of his handwriting or that he was sworn thereto. That, indeed, was an affidavit filed in the very Court in which the action was tried; but there is no difference between that case and the present, when you get the length of establishing that the original answer put in in another Court, is to be received here as the answer of the person whose answer it purports to be. I think, therefore, that this evidence was properly received.

Rule discharged.

1817.
Nov. 26.

THE KING v. WOOLER.

(1 Barn. & Ald. 193—209.)

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In striking a special jury, the coroner is not bound to take the jurors as they occur upon the sheriff's books, but is to make a selection; and where he had made such selection impartially, the Court refused to cancel the list of persons so selected.‡

THE defendant on a former day in this Term obtained a rule to shew cause why the list of persons named by his Majesty's coroner to form the jury on the trial of the information (filed against him by the *Attorney-General* for a libel) should not be cancelled, on the ground of such persons having been improperly, illegally, and partially selected by the coroner; and why the sheriffs of London should not again attend the coroner with the books or lists of persons qualified to serve on juries, for the purpose of forty-eight persons being named, out of whom a jury might be formed for the trial of the issue joined upon the information. The defendant and his solicitor, Charles Pearson, in

‡ 2 Blac. Rep. 1190.

† The statutory provisions as to summoning a coroner's jury (6 Geo. IV. c. 50, s. 52, and 50 & 51

Vict. c. 71, s. 3), do not interfere with the principle of this decision.—B. C.

their affidavits in support of the rule, stated that they attended the nomination of the forty-eight persons at the Crown Office, where the clerk of the secondary of London having produced several books, lists, and papers purporting to be the lists of persons qualified to serve on juries within the city of London, the coroner began to select names from the books, against which selection the defendant protested, as illegal; upon which the coroner *then turning his eyes from the books, inserted a pen into one of them, and professed to take indifferently the names against which the pen alighted in the list: that his pen, however, alighting upon the name of R. Taplin, a rag-merchant, he at first announced him as one of the jurors, but upon reflection rejected him, and substituted the name of another person described in the books as a wine-merchant, who continued upon the list of the forty-eight: that the coroner also rejected a Mr. William Gillman, a respectable banker in the city of London, and substituted in his place Thomas Fellows, who was stated to be a broker, extensively employed by Government in the sale of old stores: that the defendant in both instances protested against such rejection and substitution, but in vain: that the whole of the forty-eight had not been impartially and indifferently chosen, but partially and arbitrarily culled and selected in a manner likely to prejudice the defendant materially at his trial. It was farther stated, that the books or lists produced out of which the forty-eight names were taken, were not such as the law required: that by an act of common council the lists of persons qualified to serve on juries in the city of London were required to be returned from each ward annually and signed by the alderman; that of those lists some were dated as far back as 1812; one only had been signed by the alderman, others by the deputies, others by the ward clerk, and that some of them were not even signed at all.

In answer to this application, the coroner in his affidavit stated, that at the nomination of the jury, mentioned in the defendant's affidavits, a person from the secondary's office attended, and brought with him a book containing the names of persons in the different *wards of London qualified to serve on juries; that either being the book, or similar to the one from

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which the special juries had for many years past been selected : that he also brought with him lists contained in separate books, purporting to be from different wards, and containing a general statement of persons qualified to serve on juries : that he the coroner then proceeded to select a jury from the separate lists, and not from the book formerly used for that purpose, and to the use of which the defendant objected : that having been appointed to this office in July, 1818, he was informed that the usual mode of nominating special juries in London, was by the nomination of forty-eight persons designated as merchants, in the book returned by the secondaries, and that the usual mode of nominating special juries in counties, was by the nomination of forty-eight persons designated as esquires, or other persons of higher degree, in the freeholder's book returned by the sheriff : that he had uniformly adhered to this practice of nominating in counties at large, persons designated as esquires, or persons of higher degree, and in the city of London, persons designated as merchants generally, or as of some particular description of merchants which appeared to him of a respectable class ; and that soon after his appointment, he adopted the following as the best mode of nominating the juries, *i.e.* he put his pen between the leaves of the book produced to him for that purpose, before he looked into it, and then, upon opening it, fixed upon the name of the person so designated as merchant or esquire, or other person of higher degree, which was nearest to his pen, and nominated such person accordingly : that he began to nominate the jury in this cause as in all others, by inserting *his pen between the leaves of the several books or lists, and nominating the person (designated as a merchant) nearest to whose name his pen did fall : and that having nominated one person from one book or list, he then took the next, and so in succession, endeavouring to select a person designated as a merchant, from each of the books or lists : that he frequently had occasion to look through many pages, without meeting with any person designated as a merchant, and that in one book, he did not even find any person so designated : that then finding the difficulty of fixing upon proper names in the manner already stated, he did after some time, open the leaves of the books or lists indis-

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criminally, and casting his eye rapidly over them, fixed on the names of such persons as he casually and accidentally saw described as merchants, and that he did not approve of, reject, or substitute the name of any person, from any motive of partiality, favour, or affection, or from any view whatever, but that of nominating those who came within the description of persons from whom special juries had been usually nominated: that five months having elapsed since the striking of this jury, he did not recollect the fact of announcing the name of Mr. Taplin, who is a rag-merchant, and substituting a wine-merchant in his place; but that he would not on any occasion, have nominated a person designated as a rag-merchant, because such designation would not, according to his judgment, bring the person so described, within the class of persons from whom special juries have been usually selected: that according to his judgment, a wine-merchant was of that class of persons fit to be returned upon special juries, and for *that reason only he nominated J. Mears, of whom he knew nothing except from the books or lists produced to him: that he did not recollect having announced the name of Gillman, and afterwards substituting that of Fellows, but that he could have no other motive for not nominating Gillman, but that of his being a banker, and therefore in his judgment, not coming within the description of a merchant: that his only motive for nominating Mr. Fellows was, that he accidentally fixed upon his name in the manner before stated, and that he was described in the book as a merchant: that he did not, at the time of the nomination, nor does he now, know any thing respecting Taplin, Gillman, Mears, or Fellows, their character, connections, opinions, principles, situation, or employment; and that he never received any communication, directly or indirectly, from any person of and concerning any of them; and that to the best of his knowledge, at the time of the nomination of the jury, he did not know any one of the individuals composing the same; and that he had not received any suggestion or communication whatever from any person concerning them, or any of them; and that no motive of partiality induced him to fix upon them in preference to other persons contained in the books or lists; and that he nominated them impartially, and from his

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accidentally having fixed upon them in the manner before described, and from believing them to be of that class of persons from whom special jurors had been usually nominated. The practice of selecting in counties esquires, or persons of higher degree, and in London and other cities merchants, was fully confirmed by Master *Le Blanc*, and Mr. *Barlow*, the secondary of *the Crown Office. Mr. *Collingridge*, the secondary of London, in his affidavit stated, that he had been in the secondary's office twenty-two years, and during all that time in the constant habit of making returns of grand and petit jurors: that he never had any such lists as were mentioned in the defendant's affidavits; and that until lately he had never heard of the acts of common council there referred to: that the practice usually adopted was, to apply to the deputies of the wards to send the return of all the inhabitants fit to serve on juries within their respective wards, (it coming to each ward to serve on juries about once in three years,) and from the books so returned to make returns of the grand and petit jury: and that at the time appointed for the nomination of this jury, he sent the books returned by the deputies of each ward respectively, together with a book which had before been generally used in nominating special juries.

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The *Attorney-General* now shewed cause; and after stating that the affidavits which had just been read contained so full and so distinct a disavowal of every improper motive in the officer of the Court, that the charge of partiality must be considered as completely answered; he proceeded to argue, that this mode of striking the jury was not illegal; whether the books were irregularly made up or not is immaterial upon this motion, the ground of which is, that the jurors have been illegally selected by the coroner: he was bound, however, to take the names from the lists presented by the sheriff; if those lists be improperly made out, the latter alone is responsible for his neglect. But the material question intended to be discussed upon this motion is, *whether the coroner was justified in making a selection, or whether he was not bound to take the names in the order in which they occurred upon the books of the sheriff. In ordinary cases the sheriff, out of the lists returned

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to him by the several constables and tithing-men, containing the names of persons qualified to serve on juries, selects the panel out of which the petit jury is formed ; and it might as well be said, that in that case the sheriff should take the names as they occur upon those lists, as that the officer of the Court should take them in the order they occur upon the lists returned by the sheriff. Special juries were first introduced upon trials at Bar, and in causes of great consequence ; but it being doubted in other cases whether this could be done without consent, the statute of the 8 Geo. II. c. 25, s. 15, enacted, that the Court might, on motion, order a jury to be struck before the proper officer of the Court for the trial of any issue in such a manner as special juries had been usually struck upon trials at Bar ; and by 17th section, the sheriff is directed to bring the lists of persons qualified to serve on juries, and the jurors are to be taken out of such lists. The Court therefore by this statute was empowered to order the jury to be struck, as had been usual upon trials at Bar. Then what had been that practice before the statute ? For whatever that was, was to be the rule followed by the Court in ordering, and the officer in striking, a special jury. In Lilly's Prac. Reg. 1551 a, 23 Car. II. B. R., it is stated that upon motion and affidavit that the cause to be tried at the Bar is of very great consequence, the Court will, if they see cause, make a rule for the secondary to name forty-eight freeholders. And by a rule of Trinity Term, 8 Will. III., it *was ordered, that upon every reference by the Court to the secondary to return any jury, or to name forty-eight sufficient persons to try any issue at Bar, if the attorney on one side shall make default to attend at the time appointed for the naming of the jurors, &c., in such case the secondary shall name the jury aforesaid, and shall strike out twelve on behalf of each party, and the rest shall be returned to try the issue. This is abundant authority that the practice then was for the officer to name the jury : he is in fact in this very case, as in all others, directed to name the jury, and if the fault be any where, it is in the Court who made, and not in the officer who executed the order. But the order itself is perfectly legal ; and if he is therefore to name, he must exercise a judgment on the subject. He is not to take indis-

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THE KING ^{v.} WOOLLE. criminally the names as they occur on the books. Such a practice would defeat the very object of the rule; *i. e.* the obtaining such individuals as from their education and intelligence were calculated to decide properly on questions of difficulty. The lists furnished by the sheriff contain the names of persons of various ranks and degrees of education qualified to serve on juries; and if they were to be taken indiscriminately, it might happen that the most ignorant and incompetent might be chosen to try a most momentous and difficult issue. It follows, therefore, from the terms of the Act of Parliament, the uniform practice of the Court, and the nature and object of the rule itself, that the bounden duty of the Master is to name and appoint such persons as from their condition are in his judgment most fit to discharge the duties of a juryman in causes of moment and difficulty. He has executed his duty in this instance by rejecting a rag-merchant, whom, from his description, * (judging from general character) he deemed not to be a person likely to possess the degree of knowledge requisite for a special juryman. Adopting the invariable practice, he has also rejected a banker, as not coming within the description of a merchant: he has fairly and honestly exercised his judgment in these instances, as he had a right to do; and this rule must therefore be discharged.

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The *Defendant* in person contended, that the coroner had no right to select the jury, but was bound at all events to take fairly as they occurred, the names of all such as usually served on special juries; that he had no right therefore to reject R. Taplin, who was a merchant, and substitute another. And assuming that commercial knowledge is a requisite qualification for a special juryman in London, a banker from the nature and the extent of his dealings, is as fully qualified in that respect as any merchant, to decide upon questions of difficulty: the term merchant in its larger sense, comprehends every species of person engaged in trade. As to the charge of partiality, the facts were before the Court, and they were to decide whether that was made out or not. It was of the utmost importance, that the administration of justice should be free from every ground of suspicion. In questions between individuals, the

mode (as practised) of striking special juries is of little consequence, but where the Crown and a subject are the litigant parties, it is of the utmost moment that the jury should not be arbitrarily selected by a public officer deriving his appointment indirectly from the Crown.

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LORD ELLENBOROUGH, Ch. J. :

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I entirely agree with what has fallen from the defendant, that the administration of justice ought not only to be pure, but unsuspected ; and if, after the most attentive consideration of every syllable of the affidavits, it had been made appear that in any one respect blame could be imputed to the officer of the Court, I should readily have enforced any application for his punishment, or for vacating any acts done by him in the corrupt exercise of his functions. The rule is directed against the mode of proceeding, and the conduct of the officer. As to the mode, it is said the juries are improperly and illegally struck ; and as to the officer, he is charged with partiality. Can any man, who has heard the detail of the affidavits, say that there is a colour for any part of the application ? As to the mode, is it a mode that has obtained to-day for the first time ? on the contrary, has it not obtained from all times to which the practice of the Court can be traced ? The rule itself is not modern, nor has its form been varied : it requires " that the sheriff shall attend the coroner with the books or lists of persons qualified to serve on juries, and that he shall name thereout forty-eight good and sufficient men, of whom twelve shall be struck out on each side, and the remaining twenty-four returned to try the issue." Has the sheriff then attended with the books or lists ? he has ; and the secondary, who has been acquainted with the practice for upwards of twenty years, states, that he presented to the coroner, besides the book which, during that time, had been constantly used, separate lists returned from the several wards : the officer is bound by the very terms of the statute 3 Geo. II. c. 25, s. 17,† *to take the jurors out of such lists. There is nothing, therefore, to impeach the mode as far as the source from which the officer drew his information is concerned : it is the source

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† Repealed 6 Geo. IV. c. 50, s. 62.

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pointed out by the Act of Parliament; and if the books or lists have been made up with any vice; if they are not conformable to the habit and practice that have prevailed, the parties framing them are liable to be called into court, and have the matter imputed to them as an offence; but the officer has proceeded on the books exhibited to him; he could not alter them if required, and they are the usual (and as far as he knows) the legal sources, from which special juries are to be drawn. Then as to the juries being struck illegally; is there any illegality in the officer rejecting some and substituting others? that will depend upon the fifteenth section of the statute 3 Geo. II. c. 25, which enacts, "That the Court may, on motion, appoint a jury to be struck for the trial of any issues in such manner as special juries had been usually struck in trials at Bar." The question then is, In what manner, before the passing of this statute, special juries were struck upon trials at Bar? Now it appears from Lilly's Practical Register, and from the Rule of Court 8 Will. III. that it was the practice of the Court upon trials at Bar to make a rule for the secondary to name the forty-eight: that was the form of the rule before the statute; it is authorized by the statute, and has continued to be the uniform practice of the Court to the present day: and the rule in this very instance, as in all others, directed the Master to name the forty-eight. The officer, therefore, is to nominate, *not to copy, nor to take the names in sequence as they stand upon the page; that would not accomplish the design of the Legislature and the Court; that would not secure a special jury. The situations, habits, and education of men vary: he is to nominate; and the very word implies that he is to exercise a judgment upon the subject: the mode in which the coroner proceeded, was by putting his pen into the book, and taking the name nearest his pen, of the person coming within the description of a merchant: the law does not absolutely require that the jurors shall be merchants, but the practice certainly has been within the city of London to take such only as came within that description, and in counties, those who come within the description of esquires or persons of higher degree: that has been the mode in which the officers have at all times exercised

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their judgment as to the class from which special jurors are to be selected; and the conduct of the officer would have been liable to exception, if he had departed from that practice in this instance; but it is said, that he has rejected a rag-merchant, and substituted in his place a wine-merchant. I am of opinion, that if he did this in the honest exercise of his judgment with a view of obtaining competent special jurors, he did only what was his duty: if he were even mistaken in this instance, he is not to blame, if this rag-merchant were of all men the most enlightened, and the best informed, and the Master had taken another in his place less competent, it was an error in judgment, but no crime: I, however, think that the officer, in rejecting the rag-merchant, exercised a sound discretion; for though the individual might possibly be a person of the best education and greatest intelligence, yet his description does not certainly *denote that class of persons, where those qualities are generally found; the description of a wine-merchant generally marks a person of a higher rank in society. Upon the question therefore of legality, I am of opinion, that the coroner had a right to select fairly and honestly with a view to attain the object of the rule, persons who in his judgment, were, from their better education and superior intelligence, calculated to decide upon questions of difficulty. It remains only to be considered, whether he acted partially: if he had selected any person from personal preference or any undue motive, it would be a corrupt exercise of his functions; he appears however to have been guided by the most correct and sacred sense of duty: in his affidavit he disavows all motives of corruption, and all knowledge that could possibly influence a corrupt man, or enable him to serve the purposes of corruption; he has most completely and absolutely exculpated himself, not only from the fact of corruption, but from every imputation that ingenuity could suggest against his integrity; and every person giving the least attention to the affidavits must feel convinced that he has not only acted in the incorrupt and most impartial discharge of his duty, but that he has most studiously proceeded so as to avoid imputation of any sort: he certainly is much indebted to the defendant for making this application, and thus affording him the opportunity of full exculpation. I cannot

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THE KING conclude without saying, that it is most gratifying to the Court,
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WOOLER. and most important to the public, to know that the duties of officers connected with the administration of justice, are discharged with so much integrity and such laborious industry.

[206] **BAYLEY, J. :**

I am of the same opinion. Three objections have been made by the defendant. First, that the Master has no right to nominate: secondly, that the books from which the names were taken, were improperly made out; and, thirdly, that the officer partially and corruptly discharged his functions. With respect to common juries, the power of selecting the panel belongs to the sheriff; and before the statute of 3 Geo. II. c. 25, it had been usual in cases of great consequence to have the jury named by the Master from the lists returned by the sheriff. The object of the Court was, to have the assistance of persons of superior capacity and knowledge in the decision of difficult matters of fact; and the officer of the Court, with a view to attain that object, must have selected the names of persons from those stations and ranks in society where such qualities are usually found. If the officer were bound to take the first forty-eight names that occurred on the opening of the book, would the object of the Court be attained? It clearly would not; and unless, therefore, there were some mode of distinguishing by the description annexed to the persons returned in the sheriff's books, those persons likely to possess the qualities required in a special jurymen, that purpose could not be answered. The distinction very properly fixed upon, is that of esquire in counties, and of merchant in cities: it has been from the earliest time acted upon, as to the class of persons from whom the selection is to be made. The statute 3 Geo. II. c. 25, directs special juries to be struck, as the practice, before the statute had prevailed, with respect to trials at Bar. That clearly was for the officer to name the jury; and if he had named or selected the whole forty-eight fairly and honestly, solely with a
[*207] *view of selecting persons, in his judgment, fit for the discharge of the duties required, I think he was fully authorized so to do. Then as to the charge of partiality, that is most completely and

satisfactorily answered : to avoid any imputation of that sort, the officer adopts the mode stated in the affidavit. These lists contain the names of all persons entitled to serve upon any juries ; and of course many not fit to serve on special juries, where superior capacity and knowledge is required ; the officer therefore prescribed to himself a rule of selection, (which he was not bound to do) that he might be considered to act with the utmost impartiality : he rejects Taplin, because, from his description, he did not conceive him likely to possess the intelligence required in a special jurymen ; and another as not coming within that description, from which special jurymen in London had always been taken, and he substitutes others, in his judgment, more likely to possess the qualities required in that character ; and this is done without any improper motive on his part, and without any knowledge of the circumstances of the persons rejected or substituted. I am therefore of opinion, that the officer of the Court has not acted illegally, corruptly, or partially, and that this rule ought to be discharged.

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ABBOTT, J. :

I am also of opinion that this rule ought to be discharged. The question is one of great importance to the public, as it relates to the trial by jury, which has ever been justly considered one of the most inestimable privileges of a British subject. The rule was granted, on the ground of its being imputed to the officer, that he had acted improperly, *illegally, and partially. On consideration of the affidavits on both sides, I am of opinion, that the officer has acted properly, legally, and impartially. By the rule of the Court itself, the officer is required to name the forty-eight ; in ordinary cases, the sheriff nominates the panel, and the jurors composing the same, are persons selected by the sheriff. By this statute, that power of nomination which belonged to the sheriff in common cases, is vested in the officer of the Court ; and these officers before and since the statute, have been in the constant habit of selecting for special juries, persons coming within the description of esquires or merchants ; and if this had been a question now agitated for the first time, I do not know that any better mode of discrimination could be pointed

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out. It is said, however, that the Master has departed from this mode, and from an undue preference, has selected some and substituted others: that he was influenced by any improper motive, he has most distinctly and unequivocally denied: it is true, that he rejected a person described as a rag-merchant, as not coming within that class of persons whom he thought likely to afford the degree of knowledge and intelligence requisite to enable a man to discharge the duties of a special jurymen. And although an individual of that class may possess those qualities in an eminent degree, yet the officer of the Court, judging only from his general experience, may fairly have drawn a conclusion, that superior knowledge was not generally to be found in that description of persons, and he then had a right to exercise his judgment accordingly; so he rejected another person who was described as a banker, he not coming within the description of merchants from which *class it has been usual to select special juries in London. It was objected, that he substituted a person who was employed by Government in the sale of stores; but he swears most positively, that he knew nothing of the circumstances of that person, and that he selected him as being the next person against whom his pen fell in the book. On the whole, I think that the conduct of the coroner has been legal and most impartial, and that this rule should be discharged.

HOLROYD, J. :

After what has already fallen from the Court, I shall content myself with saying, that the charge of impropriety, illegality, and partiality, is completely answered; and that the result of the affidavits is that this conduct of the coroner has been most proper, legal, and free from all partiality whatever.

Rule discharged.

VAN SANDAU *v.* —, ONE, &c.

(1 Barn. & Ald. 214—216.)

1817.
Nov. 28.

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Bond conditioned for the payment of a principal sum in the year 1820, with interest in the meantime half-yearly: an action having been brought for the penalty upon a breach of the condition in non-payment of half a year's interest on the 29th September, 1817, the Court refused to stay the proceedings before judgment on payment of the interest due and costs; although the non-payment of the interest was owing to a slip.

THIS was an action brought on a bond in the penal sum of ten thousand pounds, conditioned for the payment of five thousand two hundred and fifty pounds, on the 29th of September, 1820, with interest in the meantime payable half-yearly. The breach was the non-payment of half a year's interest which became due on the 29th of September, 1817. It appeared that the plaintiff's attorneys, on the 1st and 3rd of October, had written to the defendant for the payment of this interest, but not having received any answer, they had filed the present bill against the defendant early in this term. The defendant took out a summons before BAYLEY, J., to stay proceedings on payment of the interest due and costs. On the case coming on to be heard before the learned Judge, it appeared that the defendant had quitted London on the 27th of September, having left with an agent two bills of exchange, with directions to get them discounted, and to apply a part of the produce to the discharge of this interest in question: that the defendant did not return to London until the end of the month of October, when he found that his agent had failed to get the bills discounted, and had not paid the interest: that the defendant, on the 5th of November, tendered to the plaintiff's attorneys a cheque on the Bank of England, in whose hands he then had more than sufficient to answer the same, but they refused to accept the same, saying, that the plaintiff meant to proceed to judgment. The learned Judge was of opinion, that from the facts it was evident that the forfeiture of the bond was a mere slip, *and although in law the bond was forfeited, yet that the plaintiff should not be allowed to go on and obtain his judgment, the effect of which would be

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VAN SANDAU ^{v.} to make a new agreement between the parties; as it might compel an immediate payment of the money, which the parties had agreed should not be paid until the year 1820, and thereupon he ordered that upon payment of the interest due on the bond in question in this cause, with costs to be taxed, all proceedings should be stayed.

Topping, on a former day in this Term, obtained a rule *nisi* for the discharge of this order, and he referred to the statute of 8 & 9 Will. III. c. 11, s. 8, by which it is enacted, “that upon paying into Court the amount of the damages, the execution may be stayed, but the judgment is to stand as a security;” and he said that in *Darby v. Wilkins*,† where a bond conditioned to pay by instalments was put in suit, the first payment not being made, the Court refused to stay the proceedings before judgment, upon payment of that instalment with costs; and in *Massen v. Touchet*,‡ the Court of Common Pleas, in a similar case, refused to stay the proceedings, but directed judgment to be entered for the penalty, with a stay of execution; and he cited *Tighe v. Crafter* § as a modern authority to the same effect.

Bolland now showed cause, and said, that there had been contrary decisions upon this subject. In *Lucas v. London*, Mich. 11 Geo. II.,|| payment of all the past instalments with interest and costs was held sufficient, and the money not yet due was ordered out of *Court to the party who brought it in; and in *Moss v. Hardy*,¶ Trin. 28 Geo. II., the Court of Common Pleas stayed proceedings, upon payment of the only instalment then due, with costs.

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LORD ELLENBOROUGH, Ch. J. :

The defendant in this case has been guilty of a slip which amounts to a breach of the condition of the bond; he has thereby given to the plaintiff the advantage of obtaining a judg-

† 2 Stra. 957.

‡ 2 Bl. Rep. 706.

§ 2 Taunt. 387.

|| 2 Stra. 957, notes.

¶ Barnes, 268.

ment for the whole penalty. To what extent the Court may feel VAN SANDAU
disposed to relieve the defendant against the consequences of v.
such a judgment, is another question: but we are of opinion, at
present, that the plaintiff is entitled to proceed in this action,
and that the judgment must stand as a security.

Rule absolute.

C. P. HILARY TERM.

1817.
Jan. 25.

KEMBLE AND OTHERS *v.* ATKINS AND ANOTHER.

(7 Taunt. 260; S. C. 1 Moore, 6, Holt, N. P. 427.)

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See this case reported in its place with Holt, N. P., 17 R. R. 658.—R. C.

1817.
Jan. 27.

ZWINGER *v.* SAMUDA.†

(7 Taunt. 265—271; S. C. 1 Moore, 12, Holt, N. P. 395.)

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The pawnee of coffees (defendant), lodged in the West India Docks, and entered there in the pawnee's name, gave up to the pawnor certain delivery notes thereof called dock-warrants, having indorsed them with an order for the delivery of the goods to —, in exchange, not for cash, which he might have had, but for a cheque for the debt on the pawnor's banker, which cheque was dishonoured: the pawnor having contracted to sell the goods to the plaintiffs, received payment for them, and gave to the plaintiffs the delivery notes, with the blank above the defendant's signature for the name of the person to whom they were to be delivered.

Held, that the defendant having entrusted the pawnor with his signature to a blank, purporting to authorize the delivery of the goods, and enabled him thereby to induce faith to a contract for the sale of the goods, and to obtain payment for them from the plaintiff, it must be considered that the contract of sale was the defendant's contract, and the payment, a payment to the defendant.

THIS was an action brought to recover the value of thirty casks of coffee, lying in the warehouses of the West India Dock Company, which, as it appeared upon the trial before Park, J., at Guildhall, at the sittings after Michaelmas Term, 1816, the plaintiff had purchased under the following circumstances: Roebuck had previously purchased the coffee, with money advanced by the defendant, Abraham Samuda, and for securing

† *Henderson v. Williams*, '95, 1 Q. B. 521, C. A.

repayment, had transferred this coffee, in the books of the West India Dock Company, into the name of David Samuda, in trust for the defendant, by way of pledge. Roebuck afterwards, on 13th August, agreed to sell the coffee to the plaintiffs, to be paid for in cash on 17th August; and on 16th August, he requested the defendant to give up to him the dock warrants or orders for the delivery of the coffee, which the defendant refused to do, unless he were first paid his debt; whereupon Roebuck showed him 1,000*l.*, out of which, he said, the defendant should be paid; but that for the sake of acquiring credit at his banker's, he wished to pay them this sum, and immediately to give the defendant a cheque on them for 580*l.* the amount *due to him. The defendant acquiesced, and took the cheque, and wrote at the foot of the delivery notes his signature to an order for delivery of the above-mentioned goods to —, and gave them up on the same day to Roebuck, who on the 16th received of the plaintiffs the price thereof, and delivered to them the delivery notes, to be filled up by themselves with their own or their agent's name, as the party to whom the goods were to be delivered. The cheque which the defendant had taken, Roebuck immediately instructed his bankers not to pay: upon its dishonour, the defendant, before the delivery notes had been presented at the West India Docks, gave notice at the docks, and caused the delivery to the plaintiffs, who on 19th August demanded the goods, to be stopped. The plaintiffs insisted that the property of the coffee was vested in themselves, by the indorsement to them of the delivery note, for that such was the custom of this trade, established ever since the West India Docks had been formed, and they proved that the practice does prevail, of transferring these documents from hand to hand, by indorsement, as a symbolical delivery of the property, to which the officers of the West India Docks pay attention, and give effect: for that, upon the request of any holder of such delivery notes, the Dock Company will substitute for them new notes, deliverable to the holder of the old notes: it was also proved, that persons engaged in the trade, treat and consider these notes as passing the property by indorsement. The form of the notes is as follows:—

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ZWINGER
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"Warrant of Transfer.

"Number of Order, 640.

"Ship's Rotation, No. 82.

"West India Dock Warehouse, No. 8.

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"I certify that the following five casks, lot 29, of coffee, imported by the ship *T.*, Captain L., from S., entered by H. M. & Son, on the 25th day of March, 1816, have been transferred in the books of the warehouse *into the name of David Samuda. Rent commences 26th June, 1816, inclusive.

"Weighing-book,

"Dated 18th June, 1816.

No. 20, folio 164.

"C. Coldstream, Capt. No. 8.

"Entered, S. W. SANSUM, Clerk."

Then followed a schedule of the marks, and weight of the contents of each cask.

"London, , 181 .

"Deliver the above-mentioned goods to Mr. Ab. Samuda, or order.

"D. Samuda.

"No.

"Examined and entered the day of , 181 .

"London, 19 August, 181 .

"The above-mentioned goods to 'Henry Coombe & Co.,' or order.

"Ab. Samuda.

"N.B. This order must be presented at the West India Dock House, and all charges are to be paid before the goods are taken away."

The name Henry Coombe was inserted after the notes were delivered to the plaintiffs. PARK, J., assimilated these delivery notes, or warrants, as the witnesses called them, to bills of exchange, and bills of lading; both of which transfer property by indorsement; and under his direction the jury found a verdict for 586*l.*, the value of the coffee in Nov., 1816, it having risen in price since the sale.

Best, Serjt. now moved to set aside the verdict and enter a nonsuit. * * *

DALLAS, J. :

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SAMUDA.

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In this case there ought not to be a new trial. The person who enabled Roebuck to commit this fraud was the defendant, by lodging these delivery notes in Roebuck's hand, and enabling him to go to market with them. The act of Roebuck, therefore, was the act of the defendant. It is said that it would be inconvenient, if property may be transferred by these delivery notes. The best test of their convenience is the use of them, which has obtained ever since these docks have been erected. Two witnesses, very conversant with this trade, stated that there was a general practice prevalent, to receive these warrants in the market, and to pay for the goods therein specified, without going to the dock-house to examine whether any stop was put on them. Without saying that this is such an usage as to constitute a rule of law, there is, in the particular case, enough to shew that there is no foundation for the observation that the practice will be productive of inconvenience. It is enough, therefore, to say, that the persons who hold these bought notes, *have given a valuable consideration for them, and that therefore they are entitled to the property.

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PARK, J. :

I am of the same opinion : it is the defendant who is to blame, for sending out Roebuck into the world with these symbols in his hands ; and the plaintiffs, by purchasing them, obtain a right to the delivery of the coffee. As to the custom, it is asked by the defendant's counsel, how can a custom grow up in so short a time as hath elapsed since the making of these docks, but in the Newfoundland† case, it was held, that one year was enough for a practice of trade to grow up.

BURROUGH, J. :

I hope it will be understood, that the Court does not proceed upon anything like a custom in this case : the only use to be made of the evidence of the practice of the trade, is that put by my brother DALLAS : it shews that no inconvenience results from the use of these warrants. But here is a contract *bonâ fide*

† *Noble v. Kennoway*, 2 Doug. 510.

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SAMUDA.

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made: there is no misconduct in the plaintiff, as it has been urged by the defendant's counsel that there was, in paying before the time of the prompt: a man may, if he will, pay money before the last day at which he is bound to pay it; and here, the plaintiff obtains possession of this document by the act of the defendant himself: the defendant has been paid for the goods; for Roebuck and the defendant are one. He might have had his money if he would, for the plaintiff's cheque in favour of Roebuck is paid, and who is it that credits Roebuck, but the defendant? We therefore have the contract of sale, and the payment complete, which transfer the property; and though there also exists in the case this document, what difference *does it make? It does not invalidate the sale. I think, therefore, there is no ground for a new trial.

Rule refused.

1817.
Feb. 3.

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LUCAS AND OTHERS, ASSIGNEES OF THE EFFECTS OF
DOORMAN, A BANKRUPT, v. DORRIEN AND
OTHERS.

(7 Taunt. 278—294; S. C. 1 Moore, 29.)

After a contract for the sale of goods, and a written order on the wharfinger for delivery, communicated to the wharfinger, and assented to by him, though no actual transfer be made in his books, the property passes to the vendee.

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THIS was an action of trover for certain sugar and molasses, and for an indenture of lease. The declaration contained counts, laying the possession in the *bankrupt before his bankruptcy, and in the plaintiffs, as his assignees, afterwards. The defendants pleaded the general issue. The cause was tried at the sittings at Guildhall, after Trinity Term, 1816, before Gibbs, Ch. J., when the jury found a verdict for the plaintiffs, damages 12,000*l.*, subject to a case. On 4th February, 1814, the bankrupt applied to the defendants, who were his bankers, to advance him 10,000*l.* upon his note of hand, and the collateral security of certain sugars, then lying in the warehouses of the West India Dock Company, and at other places. The defendants, being satisfied with the proposed security, agreed to advance the 10,000*l.*,

whereupon a note of hand for that sum was drawn, and signed by the bankrupt, and delivered to the defendants, together with the dock checks for such sugars, which were all duly indorsed by the bankrupt, and the defendants thereupon advanced the 10,000*l*. Of such sugars, part were afterwards sold by mutual consent, and the net proceeds thereof placed to the credit of the bankrupt's banking account with the defendants, and other parts thereof were, at the bankrupt's request, exchanged for certain quantities of molasses then lying also in the Dock Company's warehouses; and the dock checks for such molasses were in like manner indorsed by the bankrupt, and delivered to the defendants. The bankrupt's said note of hand fell due on the 11th February, 1815, but it not being convenient to him then to pay it, the defendants, at his request, agreed to continue their said advance for one month longer, upon the bankrupt's renewed note of hand for the like sum, and the collateral security of certain sugars and molasses to be specified on the back of such renewed note. On the 23rd February, a note of hand of that date, for payment to the defendants of 10,000*l*. at one month after date, value received, with interest, and expressing that certain sugars and molasses, *as specified on the back, were left as a collateral security, (the numbers, marks of the cask, and other description whereof, were indorsed on the note,) was accordingly drawn and signed by the bankrupt, and delivered to the defendants, together with the dock checks for the last-mentioned sugars and molasses, which checks were all duly indorsed by the bankrupt. The only matters in dispute were the hogsheads, casks, and barrels of molasses, referred to in the four dock checks, whereof copies were annexed to the case,† and also the lease mentioned in the plaintiff's declaration. On the 2nd March, 1815, the bankrupt suspended his payments in business, which circumstance was not known to the defendants until the 4th, when they were informed thereof by the bankrupt's attorney. On 7th March, the defendants applied *at No. 3 dock warehouse, and produced two of the checks so deposited by the bankrupt, one

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† The form of one of these dock checks, for which printed blanks are prepared and kept by the Dock Company, is given below.

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for 51 hogsheads, the other for 19 barrels ; which checks, with their indorsements, were examined by the warehouse keeper, who, after comparing them with the Company's books, said that they were sufficient for the delivery of the molasses. The duties on the 19 barrels of molasses being paid, they were delivered to the defendants on the 19th of March, but the duty on the 51 hogsheads not being paid, they remained in the warehouses. On 7th March, the defendants' clerk likewise applied at No. 6 warehouse, producing two more of the dock checks, one for 129 casks, the other for 20 casks of the molasses, which checks were in like manner examined, and compared by the warehouse-keeper, who also said that they were sufficient for the delivery of the molasses, but the duties on the 129 casks and 20 casks not being then paid, the delivery of them was not required, and they remained in the warehouse. On the same day, the defendants' clerk applied at No. 10 warehouse, producing another of the Dock checks for 52 casks of the molasses, which check being examined and compared by the warehouse-keeper, he answered, that he had no objection to the delivery of the molasses. The duties on 35 casks (part of the 52 casks) were paid on the 9th ;

warehouse No. , of the West India Dock Company, has this day been lodged with me.

No. of Order.	Marks of Lots.	Description of Goods.	Ship.	Master.	By whom granted.	In whose favour.
1192 and 3	MA h E & S	52 Casks Molasses.	William	Lintclater. Entd. July, 1813.	T. Kenble & Co., and G. Dorrien & Co.	G. Ackland & Co.

Given under my hand this 4th Feb. 1814.

West India Dock House.

(Signed) J. T. HAMILTON, Clerk.

N.B. To prevent delay, parties lodging orders for the delivery of goods, at the Dock House, are desired to present at the same time this check filled up, and ready for insertion of the number of the order, and the clerk's signature, which will greatly promote dispatch.

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and on that day, the 35 casks were delivered to the defendants. On the 10th March, the duties were paid by the defendants on 80 casks, (part of the 129 casks,) and on the following morning, 11th March, the defendants sent carts to fetch these away; but the delivery of them was refused, the clerk, who was sent to receive them, being told, that a commission of bankrupt had been issued against Doorman, and that no more of the molasses would therefore be delivered without the consent of the assignees. No application was ever made by the defendants to obtain a re-housing of any *of the sugars and molasses, of which the dock checks were so indorsed, and delivered to them on the 4th Jan. and 23rd Feb. 1815, nor was any part of such sugar and molasses transferred into the defendants' name in the books of the West India Dock Company, but the whole stood and remained in the name of the bankrupt. Some months previous to the 10th of March, 1815, the bankrupt applied to the defendants with the lease mentioned in the declaration, and requested them to advance him money on the security thereof, which they declined. But the bankrupt left the lease with the defendants, without making any declaration of the purpose for which the same was so left, and the lease remained in the possession of the defendants, loose, and uninclosed in any cover, from that time down to the issuing of the commission, and afterwards. On the 10th March, 1815, a commission of bankrupt was duly awarded and issued against Doorman, on an act of bankruptcy committed by him on 8th March, but of which act of bankruptcy the defendants had no knowledge, nor had received any information thereof, until after the issuing the commission, and on 10th March a provisional assignment was made to J. Billing, who on the same day gave notice to the West India Dock Company of such commission and assignment. On 25th March, an assignment was made to the plaintiffs; on 26th March, the bankrupt's said renewed note for 10,000*l.* fell due, and was not paid, nor has the amount thereof been since reduced, save as hereinafter mentioned. In pursuance of a mutual agreement between the parties, the lease has been sold by the plaintiffs for the net sum of 1218*l.*, and the molasses by the defendants, for the net sum of 1144*l.* 2*s.* 5*d.*, which sums are to be accounted for by the

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parties respectively, according as the verdict shall be finally settled in the *above cause. At the time of issuing the commission, there appeared upon the face of the bankrupt's banking account with the defendants, to be a balance 866*l.* 1*s.* in favour of the bankrupt; but in such account was not included the amount of the bankrupt's unpaid note of 10,000*l.* of the 23rd February, 1815, so received by them as aforesaid. After debiting the banking account with the unpaid note of 10,000*l.*, and with certain payments since made by the defendants, and after crediting it with monies since received by them in respect of the said collateral securities, there was and is a final balance due to the defendants from the bankrupt's estate of 3,499*l.* 1*s.* 11*d.*, for which balance, or any part thereof, they held no security whatsoever, nor did they possess any claims in respect thereof, other than their claims upon the net proceeds of the lease, and the dividends which might be payable under the commission in respect of their final balance, or of some part thereof, the net proceeds of the molasses so sold by them under the said agreement, being comprehended in the said final balance of 3,499*l.* 1*s.* 11*d.* The molasses and lease in question having been disposed of by mutual consent, prior to the commencement of the action, such disposition thereof was to be considered as equivalent to a demand and refusal. The questions for the opinion of the Court were, whether the plaintiffs were entitled to recover for the molasses, or any and what part thereof, in this action; and whether they were entitled to recover for the lease. If the plaintiffs were entitled to retain the verdict, the amount of the damages was to be settled according to the rule which the Court should pronounce. If not, a nonsuit was to be entered.

[After argument :]

[288] DALLAS, J. :

If I could myself entertain the least degree of doubt, I should wish this case to go to a second argument, but I entertain no doubt on it whatever. The facts are, that the bankrupt applies to the defendants, who are bankers, to discount for him a note for 10,000*l.* on the security of these sugars, and they receive an

assignment of the dock warrants. The defendants are unable to pay, and the bankers consent to renew the note for another month: an act of bankruptcy takes place on the 8th of March: notice of the transfer was given to the Dock Company on the 7th, the day before the bankruptcy. If, therefore, there was any complete delivery, there was a delivery to the defendants before the bankruptcy. *And there is this farther fact: the clerk of the Dock Company, on the dock warrant being exhibited to him, says, "this will suffice." Therefore I must take it, that the Dock Company, through their agent, had notice of the transfer; and though nothing was done in consequence of that notice, yet it falls within the case in Camp.† where Lord ELLENBOROUGH held, that the mere giving notice to the wharfinger, without any thing done thereon, was effective to complete the transfer of property. It is not necessary in this case to decide, whether an indorsement of the dock warrant will pass the property, and though I should feel no doubt in deciding the general question, yet I hold it more prudent in this case to abstain. This is also distinguishable from every other case, except the cases of *Spear v. Travers*,‡ and *Harman v. Anderson*,† decided by Lord ELLENBOROUGH and the Court of King's Bench. There are two parts in the last-mentioned case, and though Lord ELLENBOROUGH, Ch. J. did say at the trial that the transfer in the books passed the property, yet he afterwards says, "The delivery note was sufficient, without any actual transfer being made in their books." *Spear v. Travers* is valuable for two purposes: first, it shews what GIBBS, Ch. J. held, respecting the operation of these dock warrants; secondly, it shews that a special jury have expressed an opinion upon the subject. The sugars must be deposited with the Dock Company for securing the duties. The warrant itself contains a form of indorsement. What can be stronger to shew the intention of the parties, that the property should pass by indorsement, than the form of indorsement put on it in the original making of the instrument? In *Lempriere v. Pasley*,§ ASHHURST, J. lays down, that the assignees must be affected with the same equities as the *bank-

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† *Harman v. Anderson*, 11 R. R.
706 (2 Camp. 243).

‡ 4 Camp. 251.
§ 2 T. R. 483, 491.

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rupt; and as a banker would have a lien against the bankrupt, so has he against the assignees. But it is said, the property itself must be actually delivered, and cannot pass by delivery of the securities. The general rule is this: if the bankrupt indorses the bill of lading of a ship at sea, the property passes. The reason is given in *Lempriere v. Pasley*, viz. that the beneficial interest is in the creditor, though the legal estate is in the bankrupt. How can it be said, that where the property, by its nature, is to pass from hand to hand by the assignment of the document which is the title deed of the property, there it shall not pass by indorsement of these dock warrants. Here too is proved a notice, and actual assent by the clerk of the Dock Company, saying "all was right." The second point is decided by the first. It does not appear to be possible that it can be seriously contended that these goods were in the order or disposition of the bankrupt. The principle of that statute of 21 Jac. I. is, that mere possession of goods is the first proof of property, and the holder gets credit accordingly; and he who trusts a bankrupt with the possession will abide the event accordingly. But here the bankrupt had neither the actual nor the legal possession. But suppose he had a legal possession, was the property that of which he was the reputed owner? If, after borrowing the first 10,000*l.*, he had gone to another banker, to borrow more, he could not have done it, without indorsing the dock warrant to the lender, and that he had not to produce. I have been several times stopped by a special jury, they being satisfied that the goods pass from hand to hand by indorsement of these instruments. All special juries cry out with one voice, that the practice is, that the produce lodged in the docks is transferred by indorsing over the certificates and dock warrants, and therefore there is no reputed owner, *if he does not produce his certificate. The case of the dyer's plant, *Bryson v. Wylie*,† is not applicable. Nor is that of *Gordon v. The East India Company*.‡ That case is expressly the reverse, for no transfer could be made in the books of the East India Company: it was a breach of their regulations for Cameron to part with that

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† 1 Bos. & P. 83, n., S. C. Cooke's
Bankrupt Laws, 3rd edit. 417.

‡ 4 R. R. 428 (7 T. R. 228).

privilege at all; therefore taking this either on the justice of the case, or on the law of the case, the plaintiffs are entitled to recover.

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PARK, J. :

Notwithstanding the present state of the Court,† and the importance of this question, and the quantity of property depending on it, it would be improper for me to entertain a doubt, in a case where there is no ground for doubt at all. It was argued by the counsel for the plaintiff, that the apparent ownership remained with the bankrupt, but I know not what more the bankrupt could do to divest himself of the possession, than he did. For the bankrupt gives an order to the Dock Company for delivery of the whole, and the defendants did get possession of two parcels of these goods, which actually were delivered. Therefore the bankrupt had done all that depended on him. I give great weight to the inconvenience which the defendant's counsel relies on, that it would be dreadful, if a merchant had to go down to the dock ten or twenty times in a day to see to transfers of these goods. No man living would have purchased these goods, unless the dock warrants had been produced: they were the key of this property. All the cases are distinguishable: in every one of them there was a possession, which there is not here. Was there a delivery here? If not, wherefore did the assignees bring their action of **trover*? In most cases the assignees have been the holders of the property, and the party who contends that the transfer has not been completed, has sued to recover it back; here the action is brought to enforce the completion. Without infringing on the stat. 21 Jac. I. in the least respect, and supporting all the cases that have been cited to-day, we must hold that this property passed to the defendants. There is no lien on the lease, which was casually left in the defendant's possession.

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BURROUGH, J. :

There is not a question as to the lease. The case states that

† Gibbs, Ch. J. being disabled, by severe indisposition, from attending the Court during this Term.

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the bankrupt applied to borrow money on it, which the defendants declined to lend: a court of equity, therefore, never would have deemed this a security for money. It was left in the defendant's banking-house by mistake, and the defendant's possession of it is explained. As to the other part of the case, I have no doubt but that the property is in the defendants. This instrument is perfectly well known to all traders, and it is also known to them that the goods pass by indorsement of it, and there is no reason why they should not: it is a transfer of a mere chattel, and there is no reason why an order for delivery of the goods should not pass the property. I should have thought, independently of the notice to the Dock Company, that the property was transferred by the mere indorsement for a valuable consideration. One circumstance is important, as clothing the party with the actual possession of the goods, that the warehouse-keeper declared the orders sufficient for the delivery of the goods, and delivered a part of them. This is a question between two original parties, and not between an indorsee and another. As to the statute of James, the goods must be by the consent and permission of the true owner, in the order and disposition *of the bankrupt. It is impossible to believe, that on the 8th, these goods were in the possession of the bankrupt, with the consent and permission of the defendants. The moment that notice was given to the Dock Company, they were converted into trustees for the defendants, if it be necessary so to contend; but it is not necessary to go so far, for the statute points to an actual possession. In *Horn v. Baker*,† there was the actual possession, and the goods were used in his trade of a distiller. *Bryson v. Wylie*‡ was decided upon the ground that it was a fraudulent trick. Had the bankrupt here the power of alteration or disposition of these goods? How could he transfer them? No man in the city of London would have bought these goods without seeing the dock warrant. It was not, in the nature of things, possible that the bankrupt should sell or dispose of them. In the case of *Gordon v. The East India Company*, no alteration could be made in the books of that company, and Cameron was acting in disobedience

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† 9 R. R. 541 (9 East, 215).

edit. 417; 1 Bos. & P. 83, n.

‡ Cooke's Bankrupt Laws, 3rd

to their orders, which he was bound to obey: therefore his act was a fraud on the company, and the case mainly turned upon that circumstance. I know not whether these instruments were in use at the time when the case of *Gordon v. The East India Company* was decided: but Lord KENYON, Ch. J. relies there, on the absence of a document which Taylor could have carried to market for the purpose of disposing of that property. Here is that document. What MANSFIELD, Ch. J. says in *Thackthwaite v. Cock*, is material to the present case.† He says, “there is not such a clear, distinct, and precise custom proved as would enable others to see that these may not be the hops of the possessor.” Here subsists, I will not call it a custom, but so clear an understanding of the *trade, that this instrument by indorsement would pass the property, that every one may see that they are no longer the property of the bankrupt, who has ceased to possess this document. The defendants are therefore entitled to our judgment on this part of the case, though not on the other.

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Judgment for the plaintiff for 1,218l.

ANONYMOUS.†

(7 Taunt. 307.)

If one plaintiff be in this country and liable for costs, though another is resident abroad, the Court will not compel the latter to give security for the costs.

1817.
Feb. 6.

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HULLOCK, Serjt., moved for security for costs from one of several plaintiffs, who resided in America, the others residing here.

Vaughan, Serjt., *contra*, cited *McConnell v. Johnston*.§

DALLAS, J. :

When the defendant has one plaintiff resident here, who is liable for the costs, it is not necessary to compel security from the non-resident plaintiff, who, at all events, furnishes an additional resort.

Rule refused.

† 12 R. B. 689, 691 (3 Taunt. 487, 10 Q. B. D. 13, 52 L. J. Q. B. 192.
491). § 6 R. B. 310 (1 East, 431).

† *D'Hormusgee & Co. v. Grey* (1882)

1817.
Feb. 6.

RITCHIE v. BOWSFIELD.

(7 Taunt. 309—311.)

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Where, upon the facts proved, an inference of law arises on a statute not recollected at the trial, the Court will sometimes grant a new trial, though the point was not taken below.

The Pilot Act, 52 Geo. III. c. 39, s. 30,† which directs that no master or owner shall be answerable for loss or damage occasioned by misconduct or negligence of any pilot, does not confine the exemption to loss or damage happening to the piloted ship and cargo, but extends to damage done by that ship to others.

THIS was an action brought against the master of a ship for running down the plaintiff's vessel. Upon the trial of the cause at Westminster, at the sittings after Michaelmas Term, 1816, before Gibbs, Ch. J., it appeared that the damage was done in the Thames, at a time when the defendant's vessel had a pilot on board, as required by the new Pilot Act,‡ and the plaintiff's had none, and it was doubtful on the evidence in which of the two ships the misconduct was, but no evidence was given of any interference by the defendant with the pilot's management of his ship. The jury found a verdict for the plaintiff with considerable damages.

Best, Serjt., in this Term moved for a new trial, upon the ground that inasmuch as the defendant had complied with the requisitions of the Act, the verdict in point of law ought to be for the defendant, for that the only action (if any, seeing that the presumption of misconduct was against the plaintiff, who had no pilot on board), which could have been maintained in this case, would have been against the pilot. He admitted that he was not aware of the Act at the time of the trial, and therefore did not then make the objection, but where the law went to the merits. It was competent now to *raise the objection, as had been done in *Gill v. Dunlop*;§ and this point had succeeded

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† Substantially contained in the corresponding clause of the Merchant Shipping Act, 1894, 57 & 58 Vict. c. 60, s. 633.—R. C.

‡ 52 Geo. III. c. 39, s. 11.

§ 7 Taunt. 193, *Gill v. Dunlop*.

In that case, upon the first trial, *Lens*, Serjt. was understood by GIBBS, Ch. J. to have referred to the stat. 45 Geo. III. only, which, without the aid of the statute 42 Geo. III. would not have legalized a British

in *Bennet v. Moita*.† There was a wide difference between applying to the Court on a fact not proved, and founding an application on a consequence of law resulting on a fact proved. The Court granted a rule *nisi*.

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Lens and Hullock, Serjts., shewed cause :

This Act is quite misconceived, when it is applied to the case of one ship running down another. The 30th section is confined to damages that arise to the cargo of the same ship, not to the case of an action brought by the owners of one ship against the owners of another ship. The words "loss or damage" for which the master of a ship is not to be answerable, are, like the loss or damage which by the next clause he is not prevented from recovering, "loss or damage upon any contract of insurance or other contract relating to the ship or vessel, or any cargo on board the same." And to put the matter out of all doubt, sect. 31 expressly provides, that the Act "shall not extend to deprive any persons of any remedy by civil action against pilots or other persons, which they might have had if that Act had not been passed." It was clear, that if this Act had not passed, the present action would have lain. The preceding sections, 26, 27, 28, and 29, must also be read together, and then it will be plain that the 30th section does not apply to this case.

Best, in support of his rule, was stopped by the Court.

DALLAS, J. :

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The thirtieth section of the statute seems to me emphatically to apply to this case more than to any other ; for the steering of the ship is the act of the pilot, and it is in the steerage of the ship that the other is run down. There is nothing in the objection.

PARK, J. :

Is not the running down of one ship by another a loss or adventure in a Portuguese bottom, Company.
within the limits of the South Sea † 7 Taunt. 258.



RITCHIE damage? I can hardly conceive a case, in which the act of the
v.
 BOWSFIELD. pilot's steering a ship can injure the goods on board the same ship.

The Court upon other grounds indulged the plaintiffs with a rule absolute for a new trial on payment of costs.

SPARKS *v.* SPINK.†

(7 Taunt. 311.)

1817.
 Feb. 7.

[311]

An arrest within the verge of the palace is no ground for discharging the defendant out of custody.

VAUGHAN, Serjt., had obtained a rule *nisi* to set aside the service of a writ for irregularity, and to discharge the defendant out of custody, upon the ground that he was arrested within the verge of the palace.

He now attempted to support his rule.

PARK, J. :

If those who have jurisdiction are injured, it is for them to complain.

BURROUGH, J. :

It has been decided twenty years ago upon solemn argument, and in many cases since, that the circumstances afford no ground of discharge.

Rule discharged with costs.

† This case is referred to on the point that the privilege is that of the Sovereign and not of the place, by

CHITTY, J. in *Combe v. De la Bere* (1882) 22 Ch. D. 316, 335.—R. C.

BROWN v. MILNER AND ANOTHER.

(7 Taunt. 319—324; S. C. 1 Moore, 65.)

1817.

Feb. 8.

In an action for seaman's wages, it is not a part of the proof incumbent on the plaintiff, to shew that his ship earned freight.

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If the defendant would disaffirm the plaintiff's right to wages, he must prove that the ship earned no freight.

THIS was an action of *indebitatus assumpsit* "for wages and reward due and payable from the defendants, as owners of a certain ship, to the plaintiff, as master thereof, on their retainer, for a long time before then elapsed." The defendants pleaded the general issue and the Statute of Limitations. The cause was tried at a sittings at Guildhall in this Term, when it was proved that the defendants were owners of the ship *William and Mary*, wherein the plaintiff, in 1800, went as master, on a voyage to Russia, where he was detained under an embargo for six months; and a reasonable sum for his wages was ten guineas per month. It was proved that the *William and Mary* had since been seen in England, but it did not appear when she returned, nor how she was loaded. No distinct evidence was given, that the plaintiff came home in her as master, nor that any freight on that voyage was earned or received. The plaintiff proved, that one of the owners had in 1815 acknowledged the receipt of a letter from the plaintiff stating that 62*l.* 6*s.* was due *to him for five months and 28 days' service, at ten guineas per month, and had answered, that what was the plaintiff's due would be paid. The same owner, in a second letter, professed ignorance of the business, and referred the plaintiff to her solicitor, adding that, "as the other parties were not willing to pay, she could not think of doing it herself." *Hullock*, Serjt., for the defendant, objected, that there was no evidence of any freight being earned; but the learned Judge who tried the cause thought that there was evidence to go to the jury, and directed them that they must form their opinion upon these letters, in which the plaintiff noticed that 62*l.* 6*s.* wages was due to him, and the defendant did not, in her answer, deny the fact, or the service, nor rest her exemption on the circumstance that no freight had been earned.

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In the case of *Beale v. Thompson*,† which was a similar action for wages during the ship's detention, the point did not arise, for it appears by the report, that the ship, which went out in ballast, made freight on her homeward voyage. The learned Judge refused to reserve the point, the action being for so small a demand, and the jury found a verdict for the plaintiff.

Hullock, Serjt., had obtained a rule *nisi* to set aside the verdict, and have a new trial.

[After argument:]

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DALLAS, J. :

Since the declaration in similar actions does not aver the earning of freight, it is a strong indication that it is not necessary for the plaintiff to prove it; for a plaintiff is entitled to recover upon proof of the facts stated in a sufficient declaration. In the declaration in *Beale v. Thompson*, there is no averment of the sort; none of the cases cited appear to me at all to touch this case.

PARK, J. :

We all think there was evidence to go to the jury, but we grant a new trial, upon the terms that the defendants shall not deny the ownership of the vessel, nor set up the Statute of Limitations, and we do it on the ground that the defendants' counsel did not address the jury.

BURBROUGH, J. :

The only question is, whether the proof of freight being earned is part of the plaintiffs, or the defendants' case. Assumpsit would not lie for wages, without a special averment that freight had been earned, if the doctrine contended for were correct. For, if the law was imperative on the plaintiff to make this the ground and foundation of his claim, it would be necessary for him to aver it as a condition precedent. And it is a fact of such a nature, that a mariner cannot easily get access to the knowledge or the proof of it, whereas it all lies within the knowledge of the

† 7 R. R. 625 (4 East, 546).

owner, and it therefore is more reasonable that the proof should rest with him.

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The COURT pronounced that the rule should be made absolute upon the terms above mentioned, the costs abiding the event ;

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But, on this day, the COURT said, that on consulting Lord ELLENBOROUGH and the other Judges of the Court of King's Bench, they were all clearly of opinion : that proof of the non-payment of freight was part of the defendant's case, and that proof of the payment of it was not a part of the plaintiff's case. They therefore thought the rule had better be

Discharged.

DOWN AND ANOTHER v. DOWN.†

(7 Taunt. 343—351 ; S. C. 1 Moore, 80.)

Devise of my message, farm, and lands, called C. farm, situate in or near the parishes of D., W., and T., now on lease to F., at the yearly rent of 150*l*. A close in the parish of D., heretofore arable and part of C. farm and occupied with it by the lessee thereof, but for thirty-three years past sown with acorns, and occupied by the owner, and excepted out of two leases of C. farm, one prior, the other posterior to the date of the devise, passes by the devise as parcel of C. farm.

1817.
Feb. 12.

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THIS was an action of trespass on the case, for injury to the plaintiffs' reversion, brought to decide the title of a certain piece of woodland, called William's Spring, situate in the parish of Datchworth, in the county of Hertford. The cause was tried before Lord Ellenborough, Ch. J. at the Hertford Summer Assizes, 1816, when a verdict was found for the plaintiffs, subject to a case. Richard Down, Esquire, deceased, was the father, as well of the plaintiffs, who were his 3rd and 4th sons, as of the defendant, who was his eldest son and heir at law. Richard Down in his life-time was seized in fee of several farms and lands in the several parishes of Stevenage, Datchworth, Welwyn, and Tewyn, in the county of Hertford, and *inter alia*, of a certain farm called Coltsfoot farm, and also of two pieces of wood land called Howe's Wood and Bull's wood, adjoining to Coltsfoot farm, which had been old woods from time immemorial, all in the

† Referred to and relied on by *v. Hardwick* (1873) L. R. 16 Eq. Lord SELBORNE, L. C. in *Hardwick* 168, 177, 42 L. J. Ch. 636.—R. C.

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parish of Datchworth. Coltsfoot farm consisted of about 172 acres. William's Spring, the close in question, was part of that farm, and held as such under the same title, and was so described in a map of the said farm made previous to the same close being planted with acorns as hereinafter mentioned. There are two ways through it, and the way from one part of Coltsfoot farm to another, is through this close called William's Spring, which immediately adjoins the upper part of it, and abuts on the road adjoining to the lower part of it; and in order to go from the upper to the lower part of the farm persons must go through this close, there being no other way, without going off the farm and by a more circuitous road. William's Spring, the close in question, consists of about seven acres, and it being of little or no value to *the then tenant, on account of the unfitness of the soil for any agricultural purpose, R. Down deceased, about 1788, with the consent of the tenant Pennyfeather, whose widow Mary afterwards intermarried with — Field, had the close ploughed up, and sowed it with acorns: it was fenced in to protect it from cattle, (but still leaving the drove-way through it before mentioned,) and was taken by R. Down into his own possession, and so continued to the time of his death, the fences round it being repaired by him from time to time, and the under-wood cut in its regular course by him with his other woodlands. Since it has been so planted, 33 years last past, it has never been held by the tenant of Coltsfoot farm. The close in question was, before it was so sown with acorns, separated from Bull's Wood by a ditch and hedge. There is now no hedge between William's Spring and Bull's Wood, but the old ditch is still remaining between them, to which nothing has been done since the former was planted. In 1808 Mary Field, the widow of the former tenant Pennyfeather, who had held the farm under R. Down and his predecessors, took from R. Down a new lease, dated 24th December, 1808, of the said farm and premises by the description of "All that messuage with the arable, meadow, and pasture lands and grounds thereunto belonging, or now, or lately used, occupied, held, or enjoyed therewith, containing by estimation 172 acres, little more or less, as the same premises are situate, standing, lying, and being in the parish of Datchworth, and in

the parishes of Welwyn and Tewyn, co. Herts, and are now in the tenure, use, or occupation of Mary Field, and are called or known by the name of Coltsfoot farm, (except out of that demise unto R. Down and Rose his wife, and the person or persons to whom the freehold of the same premises shall from time to time belong, a certain piece of ground part of *the said 172 acres, some time since planted by R. Down with acorns, and which is now a young wood, called 'William's Spring;' to hold, except as excepted, to M. Field, her executors, &c. for a term of ten years, under the yearly rents therein mentioned." On 10th May, 1813, another lease was granted to William Pennyfeather, son and successor of M. Field, by the same description, "except out of that demise a certain wood or spring called William's Spring." No abatement whatever was made in the tenant's rent by reason of R. Down having so taken into his own possession the close called William's Spring; and there would not be one hundred and seventy-two acres in Coltsfoot farm, if William's Spring was not considered as part of it: it would consist, as in the occupation of the respective lessees, under the respective leases before mentioned, if 165 acres only, accurately measured. R. Down being seized, on 19th August, 1808, made his will in writing, executed and attested to pass real estates, and died in July, 1814, without revoking or altering his will. The testator devised to his wife Rose Down, amongst other premises in the parishes of Ware, Thundridge, Datchworth, and Stevenage, his messuage, farm, and lands called Coltsfoot farm, situate in or near the parishes of Datchworth, Welwyn, and Tewyn, co. Herts, then on lease to — Field, widow, at the yearly rent of 150*l.*, and also two woods or pieces of woodlands, then in his own possession, called Howe's Wood and Bull's Wood, containing together 84 acres, and upwards, situate in or near the parish of Datchworth; to hold with the appurtenances, unto his wife Rose Down for life; and after her decease, he devised to his eldest son John Down (with other premises in Ware and Datchworth) his said two woods called Howe's Wood and Bull's Wood; to hold unto and to the use of J. Down and his heirs; and to his third and fourth sons, (the plaintiffs) *he devised, in like manner, from and immediately after the decease of his said wife, all and singular his said farms,

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 &
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c.
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lands, messuages, cottages, and premises, thereinbefore described, situate in the parishes of Stevenage, Datchworth, Welwyn, and Tewyn; to hold unto and to the use of his said two sons Henry Down and Richard Down, and their heirs, in equal shares and proportions, as tenants in common. The defendant entered into the close called William's Spring, and cut the wood † growing there, claiming to be entitled to it as heir at law to his father, and as undisposed of by his will. The plaintiffs claiming to be entitled to it as still being part and parcel of Coltsfoot farm, (as devisees of their father,) in reversion expectant on their mother's decease, brought the present action.

[After argument the COURT took time for consideration.]

[350] DALLAS, J. now delivered the judgment of the Court :

[*351] There is no question in this case as to the admissibility of evidence in order to extend or confine the operation *of this will by evidence extrinsic to it: it is only to be decided on the circumstances. For the heir it is said, that he can only be disinherited by express words or necessary implication. That rule will not be impugned by the decision in the present case. The right of the defendant to this property is put by his counsel upon two grounds. First, that William's Spring passed to himself as a part of Bull's Wood; 2ndly, that it was undisposed of by the testator's will, having ceased to be part of Coltsfoot farm, and therefore descended to the defendant as heir at law. There is no ground whatever to say, that by ceasing to be part of Coltsfoot farm it became a part of Bull's Wood; for if so, there would have been no reason for the exception, whereby in two leases the owner treats it as a part of Coltsfoot farm. The will was intermediate in time, between the two leases. It is therefore clear that at the time of making his will, the testator thought it a part of Coltsfoot farm, and not only did not at that time mean to die intestate as to this property, but contemplated it as a part of Coltsfoot farm, as it was then demised to Field, subject to the exception of William's Spring out of that demise. The judgment must therefore be

For the plaintiffs.

† This must be intended of timber-trees.

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(7 Taunt. 374—384; S. C. 2 Marshall, 551.)

1816.
Nov. 26.

[374]

A beneficial licence to be exercised upon land, may be granted without deed.‡

And is not an interest in land within the Statute of Frauds.†

A licence to be exercised upon land for twenty-one years, granted for a valuable consideration, and acted upon, cannot be countermanded.‡

A party conveying to trustees an estate in land, connected with an intricate establishment, which, after the conveyance, he continues to manage without their interference, held to have authority from the trustees to bind them and the land by all acts in the ordinary management of the establishment.

THE plaintiff declared that on 19th March, 1779, William Taylor, then being sole proprietor of the Opera-house, or King's Theatre, in the Haymarket, and having full authority to grant and sell the ticket thereafter mentioned, by indenture between him and Jacob Gourgas, in consideration of 225*l.* paid by Gourgas to Taylor, granted to Gourgas, his executors, administrators, and assigns, six silver tickets of admission to the Opera-house, or theatre, and gave and granted to the respective bearers thereof, to be admitted gratis into any part of the theatre, (the boxes and other places which were, or during the term should be occupied by subscribers to the Opera, and the boxes reserved for the use of the proprietors and their assigns, excepted,) to be present at, and see all operas, exhibitions, and other public entertainments, (the concert of ancient music excepted,) there to be had during the respective terms of twenty-one years, or twenty-one seasons, from 24th June, 1797; which six silver tickets were then already made and engraved as in the declaration was minutely described, one whereof was numbered 471; to hold the same tickets with such free licence, &c. to Gourgas and his assigns, for the term of twenty-one years, or twenty-one seasons, and with power to sell such tickets, or either of them,

† *Secus* where there is to be a *profit à prendre* out of the land, *Webber v. Lee* (1882) 9 Q. B. Div. 315, 51 L. J. Q. B. 485.

‡ Observe that these doctrines have been questioned in the judg-

ment of the Court delivered by ALDERSON, B. in *Wood v. Leadbitter* (1845) 13 M. & W. 838, 852, referred to by KAY, J. in *McManus v. Cooke* (1887) 35 Ch. D. 681, 688, 56 L. J. Ch. 662, 664.—B. C.

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and the licence, liberties, and privileges aforesaid, at pleasure : And Taylor for himself, his heirs, executors, administrators, and assigns, covenanted with Gourgas, and his assigns, that if either of those tickets should be at any time sold, then the purchaser might, upon surrendering the tickets so purchased, have a new ticket, to be made in his own name, upon payment of one guinea. And farther, for defending the rights and privileges of Gourgas, or his assigns, holders or owners *of those six tickets, against all accidents by fire, or otherwise, whereby those tickets might be lost, &c. or rendered useless to the owners, that upon notice in writing to the treasurer, at the office of the theatre, of any such loss, whereby the owners of the tickets might be deprived of the use thereof, and upon authority given to stop such lost or missing ticket at the doors of the theatre, and to refuse admission to the bearer, the real owner or proprietor for the time being should be entitled to one personal admission in respect of each such missing ticket, for one month ; and in case such lost ticket should not be produced, or appear at the theatre within the month, such proprietor should be entitled to a new ticket, for the residue of the term thereby granted, with all the privileges and advantages that the lost or missing ticket gave, or were annexed, or intended by that indenture so to be, paying for the same one guinea, and surrendering all right and interest under such former ticket, and authorizing the stopping and retaining the same, if thereafter it should be presented at the doors of the theatre : That on the 16th July, 1799, the plaintiff became the purchaser from Gourgas of the ticket numbered 471, and the lawful bearer thereof, and entitled to be present at, and see all operas, exhibitions, and other public entertainments, (the concert of ancient music excepted,) there to be had during the residue of the respective terms of twenty-one years, or twenty-one seasons : That afterwards, on 1st November, 1810, the plaintiff lost the same ticket, and thereupon, on 29th December, the plaintiff, in pursuance of the indenture, duly obtained a new ticket in lieu of the lost ticket, (and set out the description of it,) whereby the plaintiff became and thence hitherto had been entitled to all the privileges and advantages that the lost ticket gave or intended to give : That while the plaintiff was possessed

of that ticket, and so entitled, and during the *term of twenty-one seasons, on the 17th January, 1815, and whilst public entertainments, (not being the concert of ancient music,) were performed in the said theatre, the plaintiff attempted to enter the theatre at the proper door, and presented that ticket to the proper person in that behalf; and avers notice; yet that the defendant, contriving to injure the plaintiff, prevented him from entering the theatre, unless he would pay 10s. 6d., which he, thereupon, to obtain admission, paid. There were other counts stating the grievance more generally. The cause was tried at Westminster, at a sittings in Hilary Term, 1816, before Gibbs, Ch. J., when it appeared that by indenture of 1st August, 1792, between F. de Burgh, P. Goldsworthy, T. Hammersley, and W. Sheldon, Esquires, 1; R. B. Sheridan, and T. Holloway, Esquires, 2; and W. Taylor, 3; reciting four several demises of the theatre, and certain additional buildings, made by Vanburgh and others to Sir Peter Denis and James Brooke, the latest whereof was from 4th July, 1777, for twenty-one years, and that Taylor had by assignments become possessed of those leases and premises, and that in 1789 the theatre was burnt down; that Taylor rebuilt; that on 2nd February, 1792, Vanburgh and wife, and also Sheridan and Holloway, (who by letters patent from the Crown were entitled to the reversion of the premises on the termination of the then existing leases,) assigned to De Burgh, Goldsworthy, and Hammersley the ground on which the new theatre was built; in trust, first, to pay the rent to the Crown, next to pay Vanburgh, and, after his decease, his wife, if she survived, an annuity of 400*l.*, and to pay the residue then, and after the decease of Vanburgh and wife, the whole, of the profits to Sheridan and Holloway equally; that two terms granted to Vanburgh by the Crown had become vested in Sheridan and Holloway, subject to the *lease to Brooke, then vested in Taylor; that in consideration of Taylor's expense in rebuilding, and the rent, covenants, &c., Sheridan and Holloway, and also De Burgh, Goldsworthy, Hammersley, and Sheldon, as trustees, at the request of Taylor, agreed to grant Taylor a new lease of the premises comprised in the lease to Brooke, and assigned to F. de Burgh, Goldsworthy, Hammersley,

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and Sheldon, in trust for Sheridan and Holloway, for a reversionary term of twenty-two years from Michaelmas, 1803, by that indenture, De Burgh, Goldsworthy, Hammersley, and Sheldon, at the request, &c. of Sheridan and Holloway, demised, and Sheridan and Holloway granted and confirmed to Taylor, all the theatre, &c. from Michaelmas, 1803, (the expiration of Brooke's lease, then vested in Taylor,) for twenty-two years, under certain rents; and Taylor covenanted with the four trustees, and also with Sheridan and Holloway, that he, Taylor, would not during that present, or the reversionary term of twenty-two years, without the licence of Sheridan and Holloway in writing first obtained, grant away, assign, let, or dispose of any of the boxes of the Opera-house, (except 41 boxes,) otherwise than from year to year, or season to season, or grant any seats, rights, or privileges of admission whatsoever, in or to any box, or other part of the theatre (except only the said 41 boxes and 250 free admissions,) (the subscription and private boxes excepted, and any incumbrances that affected Brooke's then existing lease,) to any person whomsoever, otherwise than by the year or season, nor pull down, lessen, or decrease the number or dimensions of the boxes, nor charge or incumber the theatre, or the income thereof, or the term thereby granted, by mortgaging the same, or granting any new or additional rent-charges, or any other incumbrance; except that in case of fire, he might mortgage for the purpose of *rebuilding. And there was a proviso for the re-entry of the four trustees, on non-payment of the rent, or breach of any of the covenants, and more expressly in case of breach of the covenant last stated. By indenture of 24th August, 1792, between W. Taylor, first; J. A. Gallini, second; W. Sheldon, R. Benton, and J. Needham, third; W. Witham, fourth; R. B. Sheridan, fifth; T. Harris, sixth; and R. B. O'Reilly, seventh; reciting the demise by Vanburgh, by the lease of the 4th July, 1777, and assignment to Taylor, and reciting the title of Taylor to other premises, (being the part whereon the stage is built), and the building of the new theatre, and an agreement between Taylor and O'Reilly, (who then had Italian operas performed at the Pantheon, and was involved in debts), and that Sheridan and Holloway had purchased

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Vanburgh's interest in the patent, and that the Pantheon was destroyed by fire; and reciting the assignment above stated of 2nd February, 1792, from Vanburgh to his trustees, and that Gallini was a creditor of the theatre in the Haymarket for 19,000*l.*, and was to be paid 8,500*l.*, and the remainder by instalments; that Harris had a patent granted by Charles the Second to Killigrew, and was to receive a compensation of 250*l.* per annum for assigning the same to the Drury Lane company and theatre; that Taylor was to receive 1,000*l.* per annum out of the rents, &c. to complete the theatre; that the debts of the Pantheon and Haymarket Theatre were to be paid in rateable proportions out of the residue of the rents and profits of the Opera-house, by instalments of 4,000*l.* a year; that 200*l.* a year was to be paid to Witham as a trustee for persons then lately interested in the Pantheon, during O'Reilly's life, and that the remainder of the rents and profits was to be paid to Taylor; that to raise money to complete the theatre, and satisfy debts, Taylor was *to be authorized to sell 41 boxes at 1,000*l.* each, and that all silver tickets and claims of right of admission into the Opera-house, for which considerations had been given, should remain unimpeached: that a manager was to be appointed, with power to engage performers, and that the annual expenditure of the theatre was not to exceed 21,000*l.*; and that for carrying into execution this plan, the theatre was to be vested in Sheldon, Benton and Needham as trustees, for the residue of the terms granted by Sheridan and Holloway. Then by that indenture, in consideration of the premises, and of 10*s.*, Taylor granted and assigned to Sheldon, Benton, and Needham, the Opera-house, for the remainder of sundry terms now expired, and amongst others the before mentioned term of twenty-two years; upon trust to receive the rents, profits, subscription, door-money, and other the annual income, to pay thereout the taxes; then 300*l.* annual rent to Holloway, and 1,260*l.* annual rent to Sheridan and Holloway, to Harris 250*l.* per annum, in respect of the patent to be annexed to Drury Lane Theatre; then to pay performers' salaries, and servants' wages, &c. not exceeding 21,000*l.* then to pay Gallini's debt of 8,500*l.* by instalments of 1,500*l.* a-year, with interest; then to pay 1,000*l.* a-year to Taylor, or the

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architect or other person he might employ for ten successive years to complete the theatre; then to pay Witham for the life of O'Reilly 200*l.* a-year, viz. 100*l.* for O'Reilly, and the other 100*l.* for his sister; then to pay 4,000*l.* a-year, or such less surplus as there should be, one moiety thereof towards the discharge of O'Reilly's debts in respect of the Pantheon, and the other moiety towards the discharge of Taylor's debts in respect of the Haymarket Theatre, and the surplus, if any, above that 4,000*l.*, to Taylor for his own benefit. And the trustees were empowered to appoint a manager, removeable at pleasure; and the subscription *money and door money was to be paid to a banker to the account of Sheldon, Benton, and Needham; and after the trusts were performed, the property was to be restored to Taylor. After the execution of this deed, Taylor continued in the absolute management of the theatre, and receipt of the profits, as before, and no possession was taken by the trustees till 1800, when Sheldon entered, and for a time assumed the possession, but after that time they again replaced the possession in Taylor. On 19th March, 1799, Wm. Taylor by deed, (reciting that he had been for some time past, and then was, the sole proprietor of the Opera-house, and of all benefit to arise thereby), granted to Gourgas, his executors, administrators, and assigns, six silver tickets of admission, (among which was No. 471,) and gave and granted to the respective bearers thereof to be admitted gratis during the term of twenty-one years or twenty-one seasons, from 24th June, 1797; to hold the same with such free licence, &c. to Gourgas, his executors, administrators, and assigns, for the term of twenty-one years or twenty-one seasons, with full power to sell such tickets and licence, &c. at pleasure. And Taylor covenanted, "that he had good right so to grant such tickets, and that he would warrant to the owners thereof the free enjoyment of such right for the term, and that if either of the tickets should be sold, the purchaser might, upon delivering up the purchased ticket, have a new ticket in his own name, on payment of one guinea, and farther for preserving the right of Gourgas and his assigns, holders or owners of the ticket, against accidents whereby the same might be lost, upon notice to the treasurer of the theatre

of such loss, the owner thereof should be entitled to another ticket for the residue of the term, in the same manner as he held the lost ticket, paying for the same one guinea. And upon every sale of the ticket, notice should be given to the *office of the theatre, in order that the purchaser might be the better protected in the enjoyment of his right. On 16th July, 1799, the plaintiff purchased by public auction the ticket numbered 471, which, upon payment of the price, was delivered to him, without deed. In 1809, the plaintiff having lost his ticket, it was renewed to him in the manner stated in the declaration. He continued to enjoy a free admission to the theatre, from the time of his purchase, until March, 1814, when admittance was refused to him by the defendant, who was a receiver, appointed by the Court of Chancery, by order of the trustees, Sheldon, Benton, and Needham, upon the ground that this was a grant which Taylor was not competent to make. For the defendants it was contended, that Taylor having at the date of the deed of sale of the six tickets, no legal estate in the premises, that deed was void. For the plaintiff it was urged, that the deed of 24th August, 1792, not being accompanied with possession was fraudulent, and *Reed v. Blades*† was cited, as having disposed of that trust deed: GIBBS, Ch. J. held, that the Court had restricted that proposition to the personal effects only, which were therein comprised: he thought that the deed of 24th August, 1792, which, with relation to this question, was a conveyance of real property, was not void; he thought that the trustees were trustees to administer the funds, but that Taylor was to raise the funds, with power, perhaps, to the trustees to interpose, if they found Taylor misconducting the concern; and accordingly, in 1800 they did interpose for a time; but that previously to their interposition, the defendant being left by these trustees, who had the legal title, in possession, with all these powers to manage the Opera-house, there was the strongest implication of an authority from the trustees to Taylor to issue these *tickets; and under his Lordship's recommendation, the jury found a verdict for the plaintiff for 29l. 8s., being the damage sustained by two years' exclusion, at fourteen guineas per annum.

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Best, Serjt. in the same Term, obtained a rule *nisi* to set aside the verdict, and enter a nonsuit. In Michaelmas Term, 1816, *Lens* and *Vaughan*, Serjts. shewed cause, and *Best* endeavoured to support his rule. The Court took time to consider, and on this day the judgment of the Court, which involves the substance of the arguments on both sides, was delivered by

GIBBS, Ch. J. :

This was an action tried before me, at Westminster, against the door-keeper of the Opera-house, for denying admission to the plaintiff, who was the holder of a silver ticket, purporting to give him entrance for twenty-one years. On the 1st August, 1792, the Opera-house, &c., was conveyed to W. Taylor for a long term now expired. W. Taylor had the complete management of the concern. On the 24th August, 1792, W. Taylor conveyed the said Opera-house, &c. to trustees, in trust to receive the profits and make certain payments. The trustees did not appear to have acted under this trust, until the year 1800. On the 19th March, 1799, W. Taylor granted by indenture six silver tickets of admission to one Gourgas, entitling the holder of each of them to free admission for twenty-one years. The plaintiff became the holder of one of them, on and from the 16th July, 1799, and was never interrupted in his right of entrance till 1814, though the trustees had confessedly taken the management for some years, in and from 1800. In 1814, the door-keeper, by their direction, excluded the plaintiff, for which exclusion the present action was brought. The objections to the plaintiff's *right were, 1. That W. Taylor had parted with the legal estate before he granted the silver tickets to Gourgas, and therefore nothing passed by that grant. To this it was answered, that the trustees, in whom the legal estate was vested, left the whole management to W. Taylor, without notice to any one of their claim, and therefore his acts in the course of that management were authorized by and binding upon them. The defendant then insisted, 2. That this was an interest in land, and being for more than three years, could not pass without a writing signed by the party, or his agent, authorized in writing, and that W. Taylor was not so

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authorized by the trustees; and 3, it was farther insisted by him, that such an interest could only pass by deed, and that W. Taylor could not be authorized by the trustees to execute such deed, except by a deed from them. The answer given to the two latter objections was, that this was not an interest in land, but a licence irrevocable to permit the plaintiff to enjoy certain privileges thereon, and was not required to be in writing by the Statute of Frauds, though it extended beyond the term of three years, and consequently might be granted without a deed; and although W. Taylor had affected to grant this by deed, it may bind the trustees, not as their deed, but as a licence authorized by them. In support of this doctrine, the following cases are found: *Webb v. Paternoster*,† licence to the plaintiff from Sir W. Plummer to lay a stack of hay on his land for a reasonable time; afterwards Sir W. Plummer leased the land, and the lessee turned in his cattle, and ate the hay, for which this action was brought. The Court held that such licence was good, and could not be countermanded within a reasonable time, but that more than a reasonable time had elapsed, half-a-year, and therefore the licence was at an end. *This case was recognized and acted upon by Lord ELLENBOROUGH and the Court of King's Bench, in *Winter v. Brookwell*.‡ This shews that a beneficial licence to be exercised upon land may be granted without deed, and cannot be countermanded, at least after it has been acted upon; and this would also be sufficient to shew, that this is not such an interest in land as, by the Statute of Frauds, can only pass by writing; but if any doubt remained upon the latter point, it has been long ago expressly decided by the Court of King's Bench, in the case of *Ward v. Lake*, Sayer 3, better reported in a MSS. book of Mr. Justice Burrough, p. 36. Licence to stack coals on the defendant's close for seven years, cannot be revoked at the end of three. These cases abundantly prove, that a licence to enjoy a beneficial privilege on land may be granted without deed, and, notwithstanding the Statute of Frauds, without writing. What the plaintiff claims is a licence of this description, and not an interest in the land. Gourgas

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† Palm. 71; S. C. 2 Ro. Rep. 152; ‡ 9 B. R. 454 (8 East, 308).
S. C. Poph. 151.

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paid a valuable consideration (225*l.*) to W. Taylor for these tickets, and the trustees might have called upon W. Taylor to account to them for that money. That it was in the ordinary course of management to make such grants, appears from the plaintiff not having been disturbed by the trustees, while they had possession for some years, at least in and after 1800. He is therefore entitled to exercise the licence granted to him, and may maintain the present action against the defendant who has disturbed him in it.



1817.
April 24.

JONES v. HILL.†

(7 Taunt. 392—396; S. C. 2 Moore, 100.)

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An action upon the case in the nature of waste cannot be supported against the assignee of a lease, in which the lessee had covenanted, "from time to time, and at all times during the term, when need should require, sufficiently to repair the premises, with all necessary reparations, and to yield up the same so well repaired at the end of the term, in as good condition as the same should be in when finished under the direction of J. M.," upon a breach that the defendant suffered the premises to become and be in decay and ruinous during a large part of the term, and after the term wrongfully yielded them up in much worse order and condition than when the same were finished under the direction of J. M.

THE plaintiff declared that the defendant had held and enjoyed divers messuages and two small rooms as tenant thereof to the plaintiff, to wit, for the residue of a term ending 24th June, 1815, upon certain terms, viz. that the defendant, during his tenancy, at his own costs, would from time to time, and at all times, when, where, and as often as need or occasion should be or require, well and sufficiently repair, uphold, maintain, amend, and keep the premises, and every part, in, by and with all and all manner of needful and necessary reparations and amendments, and the same so well upheld, &c. at the end, or other sooner determination of the term, which should first happen, would peaceably yield up to the plaintiff in as good plight and condition as the same were in, when finished under the direction

† Cited and applied by KAY, J. (1889) 41 Ch. D. 532, 535, 58 L. J. in *Re Cartwright, Avis v. Newman* Ch. 590.—R. C.

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of Mr. John Middleton ; but that the defendant, not regarding his duty in that behalf, but contriving to injure the plaintiff, whilst the same were in the defendant's possession as tenant thereof to the plaintiff, to wit, on the 24th June, 1810, and on divers other subsequent days before 24th June, 1815, wrongfully suffered the messuages and two small rooms, to be, become, and continue, and the same during all that period, and still were ruinous, prostrate, fallen down, and in great decay, for want of needful and necessary reparations and amending, &c. and afterwards, on that day, the defendant wrongfully yielded up to the plaintiff the premises, so ruinous, and in much worse order and condition than *when the same were finished under the direction of Middleton. The plaintiff in his second count stated that the defendant had held divers messuages and two small rooms as tenant thereof to the plaintiff, viz. upon certain terms, that the defendant, during his tenancy, at his own costs, would from time to time, and at all times, when, where, and as often as need or occasion should be or require, well and sufficiently repair, uphold, maintain, amend, and keep the premises in, by, and with all and all manner of needful and necessary reparations and amendments ; and assigned for breach that the defendant, not regarding his duty, but wrongfully intending to injure the plaintiff, whilst the same were in the defendant's possession as tenant thereof to the plaintiff, on 24th June, 1810, and other days, wrongfully permitted the messuages and two small rooms to be, become, and continue, and the same during all that period, and still, were ruinous, prostrate, fallen down, and in great decay for want of needful and necessary reparations, and amending, maintaining, repairing, and upholding the same. The plaintiff in his third count averred that the defendant held the premises as tenant to the plaintiff, upon the terms that the defendant should, whilst he so continued tenant, sufficiently repair, maintain, support, and keep them ; and he averred that the defendant was and continued his tenant thereof from 24th June, 1810, until 24th June, 1815 ; but that the defendant, not regarding his duty, did not, nor would, whilst he so continued tenant, sufficiently repair the premises, but had neglected so to do, and on the contrary,

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during all that term, had suffered and permitted the premises to be and remain ruinous, prostrate, fallen down, and in great decay for want of needful and necessary reparations, maintaining, and upholding the same. The defendant pleaded the general issue.

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This cause was tried at the Surrey Lent Assizes, 1817, before Dallas, J. It appeared that the defendant had been tenant of the premises under a lease to Rotton for twenty-one years from 24th June, 1794, wherein the lessor covenanted that he would at his own costs cause the several alterations and improvements then going on under the direction of Mr. John Middleton, with respect to the basement stories and drains of the premises, to be completed before 24th June then next, and the lessee covenanted that he, his executors, administrators, and assigns, or some or one of them, would, at his, or some or one of their own costs, from time to time, and at all times during the term, when, where, and as often as need or occasion should be or require, well and sufficiently repair, uphold, maintain, amend, and keep the premises, and every part, in, by, and with all and all manner of needful and necessary reparations and amendments whatsoever, and the same so well and sufficiently upheld, sustained, maintained, repaired, paved, amended, and kept, at the end or other sooner determination of that demise, which should first happen, would peaceably yield up to the lessor, in as good plight and condition as the same should be in, when finished under the direction of Mr. John Middleton, agreeable to the lessor's covenant therein contained (reasonable use and wear excepted). For the defendant it was objected, that an action upon the case could not be maintained for permissive waste, upon which ground DALLAS, J. directed a nonsuit, with liberty to move to set it aside, if the Court should be of opinion that the action were maintainable.

Vaughan, Serjt. now moved to set aside the nonsuit, and have a new trial :

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The dictum of MANSFIELD, Ch. J. in *Herne v. Bembow*,[†] that case lies not for permissive *waste was merely *obiter*, and not the point in the case. By the Statute of Gloucester,

† 4 Taunt. 764.

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a tenant for years, as for half a year, or a year,[†] is liable for waste; and that, though he be assignee of the term.[‡] And he is liable as well for permissive as for commissive waste. And Lord Coke, in his reading on that statute, saith, he that suffereth a house to be out of repair is guilty of waste. So, "If the tenant suffer the houses to be wasted, and then fell down timber to repair the same, this is a double waste."§ So, "If a tenant permit a chamber to be in decay for default of plastering, whereby the great timber becomes rotten, and the chamber becomes very foul and filthy, an action of waste lies for it.|| So affirmed in error." So, "If a lessee permit the walls to be in decay for default of daubing, whereby the timber becomes rotten, an action of waste lies. *Newell v. Downing*."¶ And, "Between Sir John Corbett and Sir James Stonehouse,^{††} admitted and adjudged, that an action of waste lies for permitting the walls of messuages to be in decay and unrepaired for default of daubing and plastering, whereupon, 'no waste done,' was pleaded; and this also was admitted upon a writ of error thereon in B. R." And the cases where it has been held that an action on the case does not lie for permissive waste, must be intended of actions against tenants at will in the true and strict legal meaning of the word, not of actions against tenants for years, or from year to year. The authorities that support this distinction are collected by the deep learning of the editor of Saunders.^{‡‡} And that most able pleader *gives a precedent §§ of a declaration for the very action of case for permissive waste against a tenant for years, taking it to be acknowledged law, that the action for permissive waste will lie. In *Kenlyside v. Thornton* || it was held, that the contract does not deprive the lessor of his remedy for waste. And though in *Gibson v. Wells* ¶¶ it is put broadly in the margin, that case lies not for permissive waste, yet the case does not support the proposition to the general extent, for there it is expressly stated, that the defendant was merely tenant at will.

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† 3 Inst. 302.

‡ *Ibid*.

§ Co. Litt. 53 b.

¶ 2 Ro. Abr. 816; Wast. pl. 36.

¶¶ 2 Ro. Abr. 816; Wast. pl. 37.

†† *Ibid*.

‡‡ 1 Wms. Saund. 323 a, n. 7, and

2 Wms. Saund. 252, n. 7.

§§ 2 Wms. Saund. 252 c, note 7.

|| 2 Bl. Rep. 1111.

¶¶ 8 R. R. 801 (1 Bos. & P. N. R. 290).

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GIBBS, Ch. J.:

I do not say whether permissive waste may or may not lie, but it is impossible that it should be waste, to omit to put the premises into such repair as A. B. had put them into. Waste can only lie for that which would be waste if there were no stipulation respecting it; but if there were no stipulation, it could not be waste to leave the premises in a worse condition than A. B. had put them into. I think that is certainly not waste.

The rest of the Court concurred in

Refusing the rule.

1817.
April 28.

FRY v. HILL.†

(7 Taunt. 397—399.)

[397]

The holder of an inland bill, payable after sight, is not bound instantly to transmit the bill for acceptance.

He may put it into circulation, or

Though he do not circulate it, he may take a reasonable time to present it for acceptance.

What is a reasonable time is always a question to be determined by a jury.

A delay to present until the fourth day a bill on London, given within twenty miles thereof, is not unreasonable.

The vendor of goods being paid for them by a bill at one month after sight, given by the purchaser's banker for a larger sum than the price, the vendor paying the difference, is not, upon the bill's being dishonoured, precluded from recovering against the buyer the price of the goods.

THIS was an action for goods sold and delivered; and upon the trial before Park, J. at the sittings after Michaelmas Term, 1817, it appeared that the defendant having occasion to pay the plaintiff 184l. 18s., for goods, early on Friday the 9th day of the month, the defendant's bankers, on his account as to 184l. 18s. (parcel,) and receiving from the plaintiff the difference in cash, delivered at Windsor to the plaintiff's servant, a bill to which

† Confirmed by s. 40 of Bills of Exchange Act, 1882. The case is cited and followed by the Judicial

Committee in *Ramchum Mullick v. Luchmechund Radakissen* (1854) 9 Mor. P. C. 46.—B. C.

the defendant was no party, drawn by themselves upon their own corresponding banker in London, at one month after sight, for 140*l*. The bill was presented for acceptance on the 13th of the same month, and the country bankers having failed on that same day, acceptance was refused. *Shepherd*, Solicitor-General, contended, that as well by this course of dealing, which the plaintiff himself had elected, as by his laches in presenting the bill, the plaintiff had made the bill his own, and was paid for the goods. The jury, however, under the direction of *PARK, J.*, who relied on *Goupy v. Harden*,† found a verdict for the plaintiff.

FRY
C.
HILL.

The *Solicitor-General* now moved to set it aside, and enter a nonsuit, renewing the same objections. He insisted that it was the duty of the plaintiff, receiving a bill payable at a certain time after sight, to present it for acceptance as soon as he conveniently could: if the plaintiff had forwarded this bill for acceptance on the Friday, Saturday, Sunday, or Monday, *he would thereby have enabled the defendant to withdraw his funds from his banker's hands. The necessity is more urgent to present for acceptance a bill payable after sight, than a bill payable after date, because by deferring it, the holder protracts the period of that payment, whereby the drawer proposes to withdraw his effects from the hands of the drawee. Secondly, it was for the plaintiff's own convenience of remittance, that, instead of taking a cheque for the sum which the defendant proposed to pay, he had commuted it for a bill; and this was strongly evinced by his taking a bill, not for 184*l*. 18*s.*, but for 140*l.*, paying the difference, and therein blending his own property with this payment, whereby he had rendered the bill completely his own, and was paid for his goods.

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GIBBS, Ch. J. :

The defendant's argument on the first point would go to the extent, that the holder of a bill payable after sight is bound to transmit it for acceptance, without putting it into circulation at all. But even if it were a case in which it was required to give instant notice, it has been repeatedly determined, that the holder

† 17 R. B. 478 (7 Taunt. 159, 2 Marsh. 454, Holt, N. P. 342).

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of a bill is not bound to send it on the same day that he receives it; and there was no post to London on the Saturday. He might have sent it on the Sunday. But I do not go upon that ground. The holder must present a bill payable after sight within a reasonable time; but it is in the power of the holder to postpone the day of payment, by postponing the date of the presentment for acceptance; and he certainly may put the bill into circulation if he will. In the recent case of *Goupy v. Harden*, the bills were put into circulation; here it does not appear what was done with the bill in the interval. The question on these bills drawn at sight certainly is left very loose by the cases. The *result of the cases undoubtedly is that which I have stated; and EYRE, Ch. J. says, in *Muilman v. D'Eguino*,† that it is under all circumstances a question for the jury to determine, whether such a bill was presented in reasonable time. BULLER, J., in the same case, rather narrows that doctrine, and though he agrees, that if it were in circulation a twelvemonth, there would not be laches; but he says, that if, instead of putting it into circulation, the holder were to lock it up for any length of time, he would be guilty of laches. Is this, therefore, a case, in which the plaintiff can be said to lock up this bill for any length of time? If we were to grant a new trial, the result would come at the last to this; it would be a question for the jury, whether there has been a default to present the bill within a reasonable time. That question has already been left to the jury, and they have found that the bill was presented in a reasonable time. We think, as the matter stands, it is perfectly right.

Rule refused.

† 2 H. Bl. 565.

FAIRLIE AND OTHERS v. CHRISTIE.†

(7 Taunt. 416—421; S. C. 1 Moore, 114; Holt, N. P. 331.)

1817.
April 30.

[416]

If the assured, after subscription by the underwriter, strikes out with a pen the time of warranty of sailing, which stood in the body of the policy, and inserts in a memorandum in the margin a different time for sailing, which the underwriter does not sign, the assured thereby destroys the policy, and the underwriter is discharged from the original contract.

THE plaintiffs declared in their first count on a policy of insurance, effected on 27th Sept. 1814, at and from Java to London, upon ship or ships, sailing before 31st Dec. 1814, declared to be on goods, coffee in bags or bulk; and that by a memorandum dated 1st Dec. 1814, 8,000*l.* out of 30,000*l.*, covered by that and another policy of even date, was declared to be on coffee, shipped in the *Good Hope*; and by another memorandum of 13th Dec., it was declared that the foregoing declaration was on 3,070 punts of coffee, and 20 tubs of camphor valued at 8,000*l.*; and that 9,000*l.* more was to be on coffee by the *Starling*; and by another memorandum of 14th Feb. 1815, it was declared that 17,000*l.* of the insurance of 30,000*l.* being already declared, the remainder was as follows: 9,000*l.* on goods by the *Star*, valued at that sum, and 4,000*l.* on goods by the *Clarendon*, valued at 11,000*l.*, (7,000*l.* being insured by another policy on that ship;) and the plaintiff averred, that coffee of the value of 9,000*l.* was, on 8th Oct. 1814, shipped in Java by the *Starling*; that she on 31st Dec. 1814, sailed, and was lost by perils of the seas; that on 23rd Nov. goods value 9,000*l.* were shipped in Java, on the *Star*; that she sailed on 23rd Nov., and was captured; that goods of the value of 4,000*l.*, were on 23rd Nov. shipped in Java, by the *Clarendon*; that she sailed on 31st Dec., and was captured. In the second count, the plaintiffs stated the policy to contain a warranty to sail on or before the 10th day of Oct., and averred all the other facts as in the first count. The defendant paid the premiums into Court upon the count for

† Cited amongst numerous authorities in judgment of Court delivered by LUSH, J. in *Aldous v. Cornwell*, (1868) L. R. 3 Q. B. 573, 578; 37 L. J. Q. B. 201, 205.—R. C.

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CHRISTIE.
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money had and received. Upon the trial of this cause at Guildhall, at the *sittings after Trinity Term, 1816, before Gibbs, Ch. J., it was proved, that on the 27th Sept. 1814, when the defendant executed the policy, there was in the body of it a warranty to sail on or before the 10th of Oct., as declared on in the second count. Upon the policy were indorsed on 1st Dec., 13th Dec. 1814, and 14th Feb. 1815, respectively, the three memoranda of those dates: they were signed by the defendant's agent. Before the time when either of these memoranda were so subscribed, the plaintiffs, intending to apply for the assent of the underwriters, had written in the margin of the policy, opposite to the clause of warranty of sailing before the 10th of Oct., the words "on or before the 31st Dec. 1814," and had struck a pen through the date in the body of the policy, 10th Oct. Several underwriters had subscribed the initial letters of their names to the alteration of warranty in the margin, but the defendant had not subscribed to it. It appeared that the *Starling* with her cargo sailed on the 9th of Oct. 1814, the *Star* on the 4th, and the *Clarendon* on the 25th of Nov. It was attempted to be established for the plaintiffs, that the defendant's agent had seen the alteration of the warranty of sailing before he signed the other memoranda, and had, therefore, in signing them, virtually assented to it; but it appeared that the defendant's agent only looked at the memoranda on the back of the policy, whereas the alteration of the warranty was on the face of it, and his attention was not called thereto by the plaintiff's broker. It was contended that, at all events, if he was not entitled to recover a loss on each of the ships, he was at least entitled to recover the loss on the *Starling*, which sailed within the time destined by the original warranty; in answer whereto it was urged by the defendant, that the plaintiff, by altering the policy without the defendant's assent, in so material a part as the warranty of sailing, had *altogether vacated the contract. The jury found that the defendant had not assented to the alteration, but gave a verdict for the plaintiff for the loss upon the *Starling*, with liberty for the defendant to move to enter a nonsuit, if the Court should think that the policy was destroyed by the alteration.

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Best, Serjt. in Michaelmas Term, 1816, had obtained a rule nisi to set aside the verdict and enter a nonsuit.

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CHRISTIE.

Shepherd, Solicitor-General, now shewed cause :

He insisted that the plaintiff was entitled to recover his loss on the ship *Starling*, which sailed before the time when, by the original policy, it was warranted she should sail. A policy of insurance is a contract between the assured and each of the underwriters individually, and the contract may, as to certain of its stipulations, *e.g.* the time of sailing, be altered as to one underwriter, and not altered as to another. And in like manner, a contract might by the same policy originally be made with A, that the ship shall sail on one day, and with B, that she shall sail on another day. It is clearly not a joint contract ; if it were, the alteration by a part of the underwriters could not bind them, but it must be either good as to all, or bad as to all. If a part of the underwriters agree by a memorandum indorsed on the policy to alter the time when the ship is to sail, not touching the face of the policy, it is clear that the underwriters on the face of the policy, would not be thereby discharged. It therefore must be contended by the defendant, that the striking out the words with a pen wholly destroys the policy. But this proposition is disaffirmed by *Henfree v. Bromley*,† in which *the Court held, that an instrument altered by the maker in the most material part, though not obligatory in its altered state, may still continue good in the state in which it originally stood. An arbitrator made an award for 57*l.* : he was then *functus officio*. Afterwards, thinking that sum wrong, he struck his pen through it, and substituted 66*l.*, and the award was held good for the original sum. In *Hill v. Patten*,‡ the alteration was in the subject-matter of the insurance. Unless it can be established that the change of the day of sailing requires a new stamp, that case will not apply. In the case of *French v. Patten*,§ the plaintiff had declared on the original contract, and the defendant had signed the new contract, and so both parties had abandoned

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† 8 R. R. 491 (6 East, 309).

‡ 9 R. R. 469 (8 East, 373).

§ 9 R. R. 571 (9 East, 351; 1 Camp. 72).

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v.
CHRISTIE.

the old one. In the case of *Langhorn v. Cologan*,† cited at the trial, an entirely new subject of insurance was inserted, which had never been presented to the underwriter, and it was introduced into the very body of the policy. If there had been an actual erasure of the day in the body of this policy, and on the erasure an insertion of a new date of sailing, the case would be different, but this alteration leaves the contract in its original state. If the memorandum written on the margin had been signed by no underwriter, clearly that would not have destroyed the contract; if two had signed, that would not have discharged the contract as to the rest. This was not an alteration of the subject-matter of insurance, nor required a new stamp, still less could the old contract require a new stamp.

Best, who would have supported his rule, was stopped by the Court.

[420] GIBBS, Ch. J. :

I allow great weight to many of the arguments urged on behalf of the plaintiff. I admit, that in point of fact the distinctions stated do exist between this case and the cases which the counsel for the plaintiff expected would be urged against him. In the two cases in the Court of King's Bench, *Hill v. Patten*, and *French v. Patten* the plaintiff and the defendant had both agreed to the alteration; and the ground on which the first trial in the latter case proceeded, was, that the altered policy was a new instrument and required a new stamp: the plaintiff then proceeded on the old instrument, and the Court held that it was destroyed by the alteration. There was a material distinction, inasmuch as that alteration was made by the assent of both parties. Here the assured having the policy, containing a warranty to sail on or before the 10th of October, intends to get the time enlarged: he knows he cannot get the time enlarged without the assent of the underwriters: he proposes to them to alter it to the 31st December, and strikes out the date of 10th October. See now in what a situation he leaves those underwriters who do not agree to that alteration! For by the striking

† 13 B. R. 613 (4 Taunt. 339).

out of this date he leaves them without any evidence of any warranty of the time of sailing, or restriction as to the time when the ship will sail: this is so material an alteration, that it avoids the policy altogether. I do not know that the plaintiff did not mean to avoid the instrument as to all the underwriters: he might be confident that all would agree to the alteration, and he might intend, if any underwriters did not agree thereto, to effect a new policy to cover that interest so left uncovered. I therefore think it clear, that as to those underwriters who did not assent to this alteration, this policy is destroyed.

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CHRISTIE.

DALLAS, J. :

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There is a material difference between an alteration of a deed with the assent of the party, and an alteration by the act of a stranger. If the warranty of the time of sailing be struck out altogether, it becomes an absolute contract without any qualification; therefore this is a material alteration in a material part of the contract, made by a party to the instrument; and it therefore avoids the contract.

PARK, J. :

I am of the same opinion. In the Court of King's Bench the two cases proceeded on the contract; this does not. It is an alteration in a material part, made by a party, and the policy is void.

BURROUGH, J. :

I have no doubt on this point, nor ever had from the beginning: it is clear that the alteration is made in a material part; it is clear that it is made by the party himself; and therefore it avoids the instrument.

Rule absolute for a nonsuit.

1817.
April 30.

JONES AND MATTHEWS v. HERBERT.

(7 Taunt. 421—422.)

[421]

Upon a very strong case of fraud, not otherwise, this Court will control the legal power of a co-plaintiff to release pending the action.

[*422]

THE plaintiffs were executors, and the plaintiff Jones had instituted this action, which was debt on bond, to recover from the defendant money belonging to the testator's estate, which had been lent to the defendant by the plaintiffs. The defendant had recently pleaded a release by the plaintiff Matthews *puis darrein continuance*. *Shepherd*, Solicitor-General, on behalf of the plaintiff Jones, in Hilary Term obtained a rule *nisi* to set aside the plea, and to have the release given up to be cancelled, and that the plaintiff Matthews might pay the costs. He moved this, suggesting that the plaintiff Jones was the party beneficially interested, *and that the plaintiff Matthews was a mere trustee. *Legh v. Legh*.†

Vaughan, Serjt. now shewed cause upon affidavits that the plaintiff Jones had in her hands sufficient of the testator's money to satisfy all her beneficial interest in the trust funds, that the plaintiff Matthews approved of the loan made to the defendant for a time, and that he had since received from the defendant the sum sued for, but not the costs, which were left for the plaintiff Jones, who had brought the action, and he had now occasion to apply the money received for the benefit of other *cestui que trusts* under the will.

PER CURIAM :

In this case, where the co-plaintiff is by law competent to give a release, and we are called upon to set it aside, against the law, upon the ground of fraud, the plaintiff applying must make out a very strong case of fraud, and she makes none. We must leave the several instruments to their legal effect.

Rule discharged.

† 1 Bos. & P. 447. The effect of this case is that if a debtor, with notice that the creditor has assigned the debt for value, takes a release from him, the debtor cannot plead that release in an action brought by

the assignee in the original creditor's name. The rule of equity is elementary, and the only question was whether under the old practice a court of common law could set aside the plea.—F. P.

BAKER *v.* TOWNSEND.

(7 Taunt. 422—426; S. C. 1 Moore, 120.)

1817.
May 2.

[422]

Under a submission to arbitration of two assaults (for one of which the defendant had been indicted, and convicted at the quarter sessions), and of all costs incident to the indictment and subsequent proceedings thereon, the arbitrator awarded a payment in satisfaction of all costs incident to the indictment and previous and subsequent proceedings thereon: Held, 1. That the indictment and assaults might legally be referred. 2. That the arbitrator did not thereby exceed his authority.

IN debt on award, the plaintiff averred that by an agreement, reciting that the plaintiff had at the Stafford General Quarter Sessions preferred a bill of *indictment against the defendant for an assault, to which he pleaded not guilty, and traversed the indictment, and the same came on to be tried at the following sessions, when the defendant was convicted of the assault, but the judgment of the Court was respited until the ensuing sessions, and that the defendant claimed to be entitled to the possession of a piece of land which was disputed by the plaintiff; and that at the last-mentioned sessions the plaintiff moved for judgment for the assault, and offered to give in evidence another assault subsequently committed upon the plaintiff, in aggravation of the judgment; but it was recommended by the Court that the several assaults and the disputed right of possession, and all other questions and matters whatsoever in dispute between the parties, should be submitted to the award of M. A. W.; In pursuance of the recommendation of the Court, and of the mutual wishes of the parties, they thereby agreed reciprocally, that the plaintiff, on his part, would perform the award of the arbitrator touching the several assaults, and the disputed right of possession, and all other questions and matters whatsoever in dispute between the parties, and concerning all costs, charges, and expenses incident to the indictment, and subsequent proceedings thereon, and all other costs, charges, and expenses, relating thereto. And the plaintiff averred that the arbitrator made his award, and thereby awarded that the defendant should pay the plaintiff 10*l.* in satisfaction of the assaults, and 50*l.* in satisfaction and discharge of all the plaintiff's costs, charges, and expenses incident to the indictment, and

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v.
TOWNSEND.

[*424]

previous and subsequent proceedings thereon, and of all other costs, charges, and expenses relating thereto, and in satisfaction of all other claims and demands of the plaintiff against the defendant referred to the arbitrator; and that the *defendant should pay his own costs incident to the indictment and previous and subsequent proceedings thereon, and all his other costs, charges, and expenses relating thereto, and shewed a breach in non-payment. Upon demurrer and joinder, *Vaughan*, Serjt., in support of the demurrer, contended, that the arbitrator had exceeded his authority in awarding 50*l.* in satisfaction of the plaintiff's costs incident to the indictments, and "previous and subsequent" proceedings thereon; the submission being limited to costs incident to the indictment and "subsequent" proceedings thereon. If the parties had intended to give the arbitrator power over the costs of the previous proceedings, they would have expressed it. The word "subsequent" excludes all prior costs, and the Court cannot repudiate the word "subsequent," nor insert in the submission the word "previous," which is requisite for the plaintiff's construction. The arbitrator, feeling that the word "subsequent" gave him no power over them, purposely inserts the word "previous," to enlarge his jurisdiction, and the words "relating thereto" in the submission, do not supply the word "previous." There is nothing apparent on the face of the award by the aid whereof the costs may be apportioned, and the subsequent costs separated from the previous costs; therefore the award is bad for the whole 50*l.* No case can be cited. Next, the matter is not arbitrable between the parties. Criminal matters are to be punished. The Court of Quarter Sessions have no power to delegate the matters of indictments. *Rex v. Harding*.† "A Judge of Nisi Prius, by consent of the parties, may make a rule to refer a cause, but the Sessions cannot do so, though by consent. They may refer a thing to another to examine, and make report to them for their *determination, but they cannot refer a thing to be determined by the other." In the case of *Rex v. Rant* and *Rex v. Coombs*,; an indictment and a counter-indictment for a riot and assault

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† 2 Salk. 477.

‡ Kyd's Law of Awards, 64; and

Caldwell's Treatise on the Law of Arbitrations, 5.

were referred, and the case turned on the point whether this sort of matter could be so referred.

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v.
TOWNSEND.

Lens, Serjt. contra :

The arbitrator has used this word fully to express his conception of what the power given him was, but he has gone therein no farther than the power warranted, which extended to all costs, charges, and expenses incident to the indictment, and subsequent proceedings thereon: he awards no costs which are not incident to the indictment. As to the legality of the submission, the case of *Beeley v. Wingfield*† goes the whole length of this case. That was an action upon a promissory note. An objection was taken, that it was given on an illegal consideration, namely, that the defendant being indicted for a matter cognizable before a criminal Court, the Quarter Sessions, for maltreating his apprentice, the Court agreed to diminish his punishment, if he would pay the costs of the indictment, and he gave his promissory note for the amount; and it was argued that the note was void, but the Court of King's Bench held that the plaintiff was entitled to recover.

GIBBS, Ch. J. :

The counsel for the defendant has raised two objections to this declaration; 1st, that the arbitrator has exceeded his authority; 2ndly, that the parties have exceeded theirs, in referring this matter. As to the first point, if we look to the words of the authority, and the words of the award, it is impossible to say that the arbitrator has exceeded his authority. *The words of the authority are, all costs, charges, and expenses incident to the indictment, and subsequent proceedings thereon. There can be no doubt in the world, that the subsequent proceedings are all incident to the indictment, and that the words are only used there from a looseness of mind in the party penning it. No doubt the costs of going before the grand jury are also incident to the indictment, and the arbitrator, in finding the previous and subsequent costs, has found them to be incident to the indictment, and has well given them. As to the

[*426]

† 10 R. R. 431 (11 East, 46).

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TOWNSENT.

2nd point, the parties have referred nothing but what they have a right to refer. They have referred the several assaults; these may be referred. They have referred the right of possession; that may be referred. The reference of all matters in dispute refers all other their civil rights, which may well be referred; and the case cited by the counsel for the plaintiff recognises the principle which we establish. I am of opinion, therefore, that nothing is referred but what may properly be a matter of reference.

DALLAS, J. expressed himself to be of the same opinion on both points.

PARK, J.:

No one can say there are not many costs incident to indictments, which arise before the indictment is put on the table, and those costs, whether previous or not, are included in the word incident. As to the 2nd point, I am very glad that a case has been cited which puts the matter out of all doubt.

BURROUGH, J. concurred in giving

Judgment for the plaintiff.

(IN THE EXCHEQUER CHAMBER.)

HARRISON *v.* KING.

(IN ERROR.)

(7 Taunt. 431—432; S. C. 4 Price, 46.)

No action lies for these words, "I will take him to Bow Street on a charge of forgery," without innuendo.

THIS was a writ of error on a judgment of the King's Bench. The plaintiff below in his fifth count declared, that the defendant below in a certain discourse which he the defendant then and there had in the presence and hearing of one James Stevenson, then and still being a client of the plaintiff below, in the way of his profession and business of an attorney, intending,

1817.
May 8.

[431]

as aforesaid, in the presence and hearing of the said James Stevenson, falsely and maliciously spoke and published of the plaintiff the false, scandalous, malicious, and defamatory words following; "I will take him to Bow-street upon a charge of forgery," thereby meaning that the plaintiff below had been and was guilty of forgery. After verdict for the plaintiff below with 1,500*l.* entire damages on all the counts, and judgment thereon, error was assigned, "that the words did not import any express or precise imputation of the plaintiff below having committed forgery, but only an intention of the defendant below to take the plaintiff below to Bow-street, (without shewing where in that street, or for what purpose,) upon a charge of forgery, (without stating by or against whom made, or to be made, or of what forgery,) and which words of themselves constituted no cause of action, although they were laid in a separate count as a separate cause of action without any special damage."

HARRISON
r.
KING.

E. Lawes was prepared to argue for the plaintiff in error; and no one appearing for the defendant in error, he prayed that the judgment might be reversed.

GIBBS, Ch. J. cited the cases of *Wood v. Merrick*,† and *Poland v. Mason*, where it was held that the words should affirm the plaintiff to be a felon.‡

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Judgment reversed.

WILLISON v. PATTESON AND OTHERS.

(7 Taunt. 439—450; S. C. 1 Moore, 133.)

1817.
May 12.

No contract made with an alien enemy in time of war can be enforced in a court of British judicature,

Although the plaintiff do not sue until the return of peace,

And although the plaintiff be an English-born subject, resident in the hostile country.

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The defendant, a British subject resident here, having in his hands the proceeds of certain goods of A., an alien enemy, A. drew on the defendant, payable to his own order, and indorsed the bill to the plaintiff, an English-born subject resident in the hostile country, who sued on the bill after peace restored: Held, that he could not recover.

THIS was an action of assumpsit, upon three bills of exchange, accepted by the defendants, and indorsed to the plaintiff, and for

† 1 Ro. Ab. Action sur Case, Z. † *Ibid.* S. C. Hob. 305, 326.
p. 73, pl. 21.

(WILLISON
 C.
 PATTESON.

money lent and advanced, paid, laid out, and expended, had and received, for interest, and on an account stated; to which the defendants pleaded, first, the general issue, *non assumpsit*, upon which issue was joined; and 2ndly, the Statute of Limitations, whereto the plaintiff replied, that at the time when the causes of action accrued, the plaintiff was not within the kingdom, but in parts beyond the seas, to wit at Dunkirk in France, and that he continued there until the commencement of this suit, and that he did not during all that time arrive, or come to, or within this kingdom. The rejoinder thereto denied that the plaintiff remained and abided out of the kingdom during the time stated in the replication, upon which issue was joined. The cause was

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tried *before Gibbs, Ch. J. at Guildhall, at the sittings after Trinity Term, 1816, when the jury found a verdict for the plaintiff, damages 562*l.* 10*s.*, subject to the opinion of this Court upon the following case. In May, 1803, the defendants Patteson & Co., were merchants and co-partners, in London, and were the holders of one hundred pieces of cambric, the property of M. Varlet of Dunkirk, in France, who being indebted to Michelin, also of Dunkirk, assigned and transferred his right and interest in those cambrics, to Michelin, of which the defendants had due notice; and Michelin on 25th Nov. 1803, being then resident at Dunkirk, drew three similar bills of exchange upon the defendants, for 100*l.*, 270*l.*, and 130*l.*, one of which is as follows:

DUNKERQUE, le 25 Nov. 1803, pour 100*l.* sterling.

A trois mois de date paiez par cette seconde de change, (la première ne l'étant), à mon ordre, la somme de cent livres sterling, valeur en moi-même, que passerez suivant l'avis de .

A Messieurs . Bon pour cent livres sterling.

Messrs. Pattison, Lee, & Iselin, L. MICHELON.
 à Londres.

Indorsed.—Payez à l'ordre de Mr. T. Willison valeur reçue comptant. Dunkerque, le 26 Nov. 1803.

L. MICHELON.

Which bills were duly remitted to the defendants, and by them accepted on 3rd Jan. 1804, payable as soon as certain cambrics

should be sold, which said cambrics were afterwards sold, and the produce received by the defendants on the 7th Jan. 1804. These bills were also indorsed for a valuable consideration, by Michelon at Dunkirk, to the plaintiff, who is an English-born subject, but who then resided, and still continues to reside at Dunkirk. At the time of drawing, accepting, and indorsing these bills of exchange, France and England were in an open state of war with each other, and Michelon was then an alien enemy, but before and *at the time of bringing the present action, peace was restored between the two countries. If the Court should be of opinion, that the plaintiff was entitled to maintain this action, then the verdict was to stand. But if the Court should be of opinion, that the plaintiff could not maintain this action, in that case a nonsuit was to be entered. This case was to be turned into a special verdict if the Court should think proper so to direct.

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Lens, Serjt. for the plaintiff, anticipated that the objection to be made to the plaintiff's right to recover, would be, that though the plaintiff was a native of this country, he was at the time of drawing the bills resident in Dunkirk, then an hostile country, and that he could not, by drawing on a house in London, in time of war, withdraw his funds from this country, nor could the holder derive any advantage from a security made over to him under such circumstances. But the proposition that no contract could be made with an alien enemy, which could be supported in an English court of justice, was much too broad: it had been in certain cases holden, that even a trading with an enemy was legal; and a contract for insurance on the trading with an enemy had, until the decision of *Potts v. Bell*,† been held legal. Lord KENYON there held, indeed, that for a British subject to trade with an enemy was illegal. But in *Gist v. Mason*‡ it had been held that such contracts were not necessarily illegal; and much pains it cost to arrive at that, as a general conclusion, after an argument by civilians on that question. If any such plain and obvious principle had ever before existed, it can hardly be supposed that the doctrine should have been entirely forgotten.

† 5 R. R. 452 (8 T. R. 548).

‡ 1 R. R. 154 (1 T. R. 88).

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If there be such an universal position, that no contracts with an enemy can be sustained, the cases of *Antoine v. *Morshead* † and *Daubuz v. Morshead*,‡ ought to have been put on that ground. And if that objection was therein urged, then those cases are a still stronger authority for the plaintiff. If it be considered that that which was there done by the parties did not contravene the law of this country, that is the whole length to which the plaintiff needs to carry this case. Ransom bills were held legal up to a late period, and they were put an end to by Act of Parliament,§ not by construction of law. In *Sparenberg v. Bannantyne*,|| the general principle is laid down, upon a question whether an alien born, taken prisoner at war, could sue in our courts; and it was held that it was not essential that an enemy should be alien born; it was only needful that he should be an alien enemy. This was antecedent to the case of the *Hoop* ¶ in the Court of Admiralty, and to *Potts v. Bell*.†† The right to sue is correlative. The statute 34 Geo. III. c. 9, which prohibited payment even of the justest debts, was, certainly, introductory of a new law, and was meant so to be: it was a special Act made during a war, and expired with the war. Admitting the force of *Sir J. Nicholl's* ‡‡ argument, that it is inconsistent that there should be war for one purpose, and peace for commercial purposes, yet the mere paying a private debt is very short of commercial intercourse: the plaintiff does nothing, except that he takes an order for payment of his debt, which he does not attempt to enforce till the return of peace.

Best, Serjt. contrà :

This question has long been considered as perfectly at rest, upon the broad principle that all trading with an alien enemy is illegal. This is fully laid down in *Potts v. Bell*, and most ably *put there by *Sir J. Nicholl*. In *Gist v. Mason*, Lord MANSFIELD, Ch. J. does mention the authority of two cases, abundantly sufficient to shew that the law had been long established. “ A

† 16 R. R. 610 (6 Taunt. 237).

‡ 16 R. R. 623 (6 Taunt. 332).

§ 22 Geo. III. c. 25; 35 Geo. III.

c. 66, ss. 37, 38, 39.

|| 4 R. R. 772 (1 Bos. & P. 172, 2

Esp. 581).

¶ 1 Rob. 196.

†† 5 R. R. 452 (8 T. R. 548).

‡‡ 5 R. R. 459 (8 T. R. 554).

short note in Ro. Ab.,† where a trading with Scotland, then in a general state of enmity with this kingdom, was held to be illegal; and the other was a note which is now burned, which was given to me by Lord HARDWICKE, of a reference in King William's time, to all the Judges, whether it were a crime at the common law, to carry corn to the enemy in time of war; who were of opinion that it was a misdemeanor." How then can a contract arise out of a matter, which by the common law of the land, as declared by the twelve Judges, is held to be a misdemeanor? This doctrine has been confirmed too by the cases of *Brandon v. Nesbitt*,‡ and *Bristow v. Towers*,§ which determined that an insurance of the property of an alien enemy is illegal and void. In the case of *M'Connell v. Hector*|| it was decided that a subject residing abroad is to be considered as a foreigner. Lord ELDON, Chancellor, in his judgment in the case *Ex parte Boussmaker*,¶ says, "if this had been a debt arising from a contract with an alien enemy, it could not possibly stand; for the contract would be void." The present is not the case of a contract made in peace, and suspended by war, that can at the return of peace be set up again. It may be admitted, that the adoption of this doctrine in modern times originated in the Admiralty Court; for Lord MANSFIELD kept it out of the sight of the courts of common law as much as he could. In the case of the *Hoop*,†† Sir W. Scott's judgment is conclusive. In *Villa v. Dimock*,‡‡ the same principle is established. England *was the last state which in modern times came into this rule, making contracts with an enemy in all cases illegal, unless under the exceptions prescribed by licence from the sovereign. There may be pecuniary advantages derived from the continuance of commerce with a neighbouring nation during a state of war, but it is restrained by considerations of much superior cogency. In the present case these reasons most forcibly apply. The bill is payable to the order of the drawer, and is not indorsed till the [next day after the making. It is indorsed to a Scotchman, resident at Dunkirk,

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† 2 Ro. Abr. 173; Prerogative Le Roy. L. Guerre, pl. 3; P. 13 E. 2, B. R.

‡ 3 R. R. 109 (6 T. R. 23).

§ 6 T. R. 35.

|| 6 R. R. 724 (3 Bos. & P. 113).

¶ 9 R. R. 142 (13 Ves. 71).

†† 1 Rob. 198.

‡‡ Skin. 370.

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Lens in reply :

The argument for the plaintiff destroys itself, for the law cannot depend upon the degree of hardship. It was held when those cases of *Antoine v. Morshead*, and *Daubuz v. Morshead* were decided, that they did not establish this principle. Those cases were the converse of this: there an English gentleman resident in France drew on England in favour of an enemy resident there. If all the *detenûs* were liable to be starved, it would be a ground for the legislature to legalize their commerce, by a new Act of Parliament, but it would not make their bills legal. The plaintiff's argument has never controverted the doctrine of *Potts v. Bell*, and it admits that if this were a contract of that sort, its legality could not for a moment be maintained. But these bills were not a payment for those cambrics: the mention of the cambrics was only material in this case, as shewing that the conditional acceptance, payable on payment for the cambrics,

† Repealed, Stat. Law Rev. Act, 1871.

had become absolute. It is said, that these bills were drawn for the produce of those cambrics. There might be something like a commercial dealing between the defendant and Michelin, but not between the plaintiff and the defendant. Willison, the payee and indorsee of the bill for a valuable consideration, is not stated on the case to have notice of the purpose for which the bills are drawn. He does not appear to have had any interest in the sending of those cambrics into this country: he is no further connected with the cambrics than this, that as soon as the cambrics are sold, Michelin has a fund in this country, out of which he draws, payable as soon as that fund is productive, in favour of his creditor the plaintiff. But it is necessary for the defendant to shew, that if an alien enemy has a fund in England, on which he has a right to draw, he cannot pay a private debt to another out of that fund. It by no means appears that the debt from *Michelon to the plaintiff did not arise for goods sold and used in his own country. The defendant must therefore establish, that if a foreigner send goods here, which escape confiscation, the proceeds of the sale of the goods are so far tainted, that he can never pay a debt out of that sum. If it were material, the plaintiff would be entitled to add to the case the fact that the plaintiff had nothing to do with the sending over of the cambrics. Much of the defendant's argument rested on the supposition that he had. But having thus thrown the cambrics out of the case, the plaintiff is upheld by the authorities, in contending, to the full extent, that an alien enemy may in time of war legally draw on a fund in this country; for otherwise *Antoine v. Morshead* and *Daubuz v. Morshead* cannot be supported. In the case *Ex parte Boussmaker*, Lord ELDON does not go the length which the defendant's argument requires: his dictum, however, ought to go no farther than the case to which it relates; and even if it be a just inference, that it was meant to be so general, this Court must pronounce whether there is any foundation for so unlimited a position, which the case then in judgment did not call for, and which is not supported by any authority. In the case of *Bell v. Gilson*,† it was doubted, by so venerable an authority as HEATH, J., whether a trading with an enemy was illegal. Neither the judg-

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† 4 R. R. 823 (1 Bos. & P. 345).

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ment of Sir W. Scott, nor any other, goes to the length, that when war prevails, no payment of a subsisting debt by an alien enemy can possibly be legal, it not being shewn how that debt arose. All that appears here is, that Michelon being indebted to the plaintiff, who was resident in the same place, it not appearing how that debt arose, pays it by drawing on a fund which he has in this country. And the plaintiff *may recover without interfering with any adjudged case, or any recognized principle.

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GIBBS, Ch. J. :

I think my brother *Lens* has put this case on the true ground, and it is fit that the Court should not pass by the difficulties which he has attempted to throw in their way. He truly states, that it does not appear on the facts of this case when the cambrics were remitted to this country, nor whether the plaintiff was conscious of the consideration upon which these bills of exchange were accepted, it therefore must be taken that he knew only that, and all that, which these bills, on the face of them, communicate. The law laid down by the defendant's counsel, that a trading with an enemy is illegal, my brother *Lens* does not deny. The defendant farther contends, that if the subjects of another state are permitted in time of war to draw bills on this country, to get those bills accepted, and to negotiate them, and if the indorsee is permitted to recover on those bills, that is as direct a trading and communication with this country as possibly can be, and therefore is prohibited. Against this doctrine, it is urged, that this is not such a trading or communication as is prohibited; and that it is so ruled by the case of *Antoine v. Morshead*. Whether in arguing that case the counsel for the defendant urged that no contract could exist, I know not: I believe he did; but I know that that was the only consideration which made the Court hesitate on that case; but they decided it on the ground that it was an excepted case, and did not come within the general rule. The bill was drawn by an English subject, on an English subject, and we thought that circumstance took it out of the ordinary rule. We adverted to the circumstance that the bill was indorsed to a foreigner, but it was not sued on until the time of peace. We also adverted to *the

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principle which the Court of King's Bench adopted in *Kensington v. Inglis*,† that that which was rendered lawful by the licence, was lawful in all its consequences; and as it was legal to carry goods from the island A. to the island B., an insurance on those goods was also lawful. So we there held, that the end being legal, the means, without which it could not be effected, were also legal. [His Lordship here read the report of the judgment in *Antoine v. Morshead*.‡] We referred ourselves to the legal purpose for which those bills were drawn, and which was the support of our fellow-subjects in France. That case, therefore, was decided as an exception to the general rule. By the general rule, I cannot help thinking that an alien enemy resident in France has no right to draw on this country for a fund due to him here; for that I take to be the very sort of communication which the policy of the law meant to prevent. It is impossible to say, that the plaintiff was not conscious of the purpose for which these bills were drawn; for on the very day after the drawing, he attempts to take to himself by indorsement those funds; which is the very species of communication that it is the purpose of the law to prevent. I come very unwillingly to this conclusion, seeing nothing dishonest in the transaction.

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DALLAS, J. :

Potts v. Bell was not the first case that so decided. The law of *Potts v. Bell* is admitted by the counsel for the plaintiff, and in that decision I find no exception to the general rule, which is, that during war all contracts are at an end. I cannot say that the drawing a bill by an alien enemy is not a contract to pay by an alien enemy or that when he indorses to an alien enemy, it is not a contract to pay to an alien *enemy, and therefore I am most

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PARK, J. :

Before the case of *Potts v. Bell*, there was an opinion prevalent in Westminster Hall, that the commerce with an enemy was not illegal. That decision, however, was founded on the opinions of all the best foreign jurists, particularly the admirable work of

† 9 R. R. 438 (8 East, 273).

‡ 16 R. R. 612 (6 Taunt. 239).

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Bynkershoek. *Antoine v. Morshead* is distinguishable from this case, for the drawer and the payee were British prisoners of war, and I hope a British prisoner of war is not to be considered as an alien enemy. Lord ELDON, Chancellor, lays it down broadly, that every contract with an alien enemy is void. An attempt was made in the Court of King's Bench, in the case of *Roberts v. Hardy*,† to extend the doctrine of *M'Connell v. Hector* farther than this Court intended. In *M'Connell v. Hector*, the plaintiff was a trader resident in France: in *Roberts v. Hardy*, the party was a private Englishman who went to America, and was there detained as a prisoner, and the Court said, a prisoner of war is not to be prevented from drawing.

BURROUGH, J. :

The Court in Hilary Term directed this to be made a case, not from any doubt which they entertained, but from a wish that the cause should be decided in the presence of my Lord Chief Justice. In *Antoine v. Morshead*, the Court recognised the principle, in deciding that case as an exception to the rule. That cannot be done indirectly, which cannot be done directly. Michelin, having funds in this country, could not, during war, bring an action for money had and received against the holder of his funds here; neither can he, by drawing a bill on his debtor, and indorsing it to another, produce the same effect. [*450] The *bill is a contract; and no contract can be enforced in a Court of British judicature, which is made during the war, and which is made by an alien enemy. I am, therefore, clearly of opinion, that a nonsuit ought to be entered.

Lens then applied for permission that the case might be turned into a special verdict, but the Court said, they felt no difficulty whatever on the question, and did not think it necessary. The plaintiff might resort to another remedy, if he had confidence in the point.

Rule absolute for nonsuit.

† 16 R. R. 347 (3 M. & S. 533).

RAW v. ALDERSON.

(7 Taunt. 453—455; S. C. 1 Moore, 145.)

1817.
May 12.

If two warrant an attorney to confess judgment against them, and one dies, judgment cannot be entered up against the other.

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HULLOCK, Serjt. had on a former day obtained a rule *nisi* that the plaintiff might be at liberty to enter up final judgment against the defendant, as of this present Term, for 240*l.* pursuant to a warrant of attorney which had been given to certain attornies named to “appear for us William Alderson and George Alderson, as of Hilary Term last past, Easter Term next, or any other subsequent Term, to receive a declaration for me in an action of debt for 240*l.*, money borrowed, at the suit of J. Raw, and to confess the same action, or else to suffer a judgment by *nil dicit*, &c. for 240*l.* and costs. And we the said W. A. and G. A. authorize a release of errors.” Executed by both. Given to secure 120*l.* on demand with interest. William Alderson, (who, it was sworn, was a surety for George), was since dead.

Hullock, being called on to support his rule, admitted that where a joint warrant of attorney was given by two, it had been held that the plaintiff cannot, after the death of one, pursue the authority against the other, as in *Gee v. Lane*.† But in the case where each of the two has authorized a warrant to be entered against *me*, it had been held that where one of the two, (which is this very case,) who give the joint authority, dies, the action may nevertheless be proceeded in. *Gladwin v. Scott*.‡ But to consider the case on a broader principle, all the authorities, (and there are several which hold that where the warrant is given to confess judgment to two, it may be entered after the death of one,) equally warrant the *plaintiff's position, that the authority survives, if it be to enter up judgment against me and another, and one dies. *Todd v. Dodd*.§ Warrant to confess judgment to two, one died before judgment, leave was given to

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† 13 R. R. 534 (15 East, 592).

name of *Todd v. Todd*, Barnes, 48;

‡ Barnes, 53.

S. C. Sayer, 5.

§ 1 Wils. 312; S. C. *fused* by

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enter up judgment against the other, for the Court held that a warrant of attorney of this sort cannot be so strictly construed as a bare authority at common law, because it is coupled with an interest, and was intended to be a security for money. Sayer † in his report of the same case differs, and is probably mistaken. *Futcher v. Smith*.‡ Upon an authority to confess judgment to two, the Court gave leave to enter up judgment after the death of one, holding that the decease of one did not operate as a countermand of that authority. So in *Fendall v. May*,§ the Court of King's Bench held that the alteration in the state of parties being only in the persons charging, and not in the persons to be charged, might make a material distinction, and that they therefore were not embarrassed by the case of *Gee v. Lane*, and granted the permission. It must turn on a principle of law. Is this, which is in substance only a security for a debt, avoided by the decease of one of the debtors?

GIBBS, Ch. J.:

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The Court of King's Bench have determined that on a warrant to confess judgment given by two, the decease of one revokes the authority of the attorney. That Court has also decided, that on a warrant to confess judgment to two, the decease of one does not revoke the authority. They considered the distinction between the two cases, and decided that in the case of the decease of one plaintiff the authority was not revoked. Unless I could see my way very *clearly, I should not depart from the decision of the Court of King's Bench. I can see strong reasons for that judgment; for instance, if a judgment be entered against two, the one standing as a surety, he may have his remedy over: his condition may be materially altered after the decease of the other.

No one was instructed to shew cause, but the Court on their own examination of the case

Discharged the rule.

† Sayer, 5.

‡ 2 W. Bl. 1301.

§ 14 R. B. 593 (2 M. & S. 76).

ROBINSON *v.* YARROW.†

(7 Taunt. 455—458; S. C. 1 Moore, 150.)

1817.
May 12. .

[455]

The acceptance of a bill drawn by procuration admits the drawer's handwriting, and the procuration to draw.

But though the bill is indorsed by the same procuration, the date thereof not appearing, the acceptance does not admit the procuration to indorse.

So, though the indorsement were made before the acceptance. By PARK, J.

ABRAHAM HENRY had been a partner of Charles Staeben, under the firm of Staeben & Co., but they had dissolved that partnership; after which Henry drew a bill on the defendant at two months' date, payable to "our order," which he signed *P. pro* C. Staeben & Co., A. Henry, and indorsed it to the plaintiff in like manner, by the signature *P. pro* Chas. Staeben & Co., A. Henry. The defendant accepted the bill, and in this, which was an action against him for non-payment, the plaintiff in his first count declared on the bill as drawn by Abraham Henry, using the name, style, and firm of Chas. Staeben & Co., and averred an indorsement by Henry, not noticing therein that he indorsed by procuration. In the second count the plaintiff averred that the bill was drawn by A. Henry, and indorsed by A. Henry, not noticing the procuration. In a third count the plaintiff alleged that certain persons using the style of Chas. Staeben & Co. drew the bill, and that the said Chas. Staeben & Co. indorsed the bill. Upon the trial of the cause at Guildhall, at the *sittings after Hilary Term, 1817, before Burrough, J. these facts were proved, except that no evidence was given of the hand-writing of the indorsement by Henry. Under the direction of BURROUGH, J. a verdict passed for the defendant.

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Vaughan, Serjt. had obtained a rule *nisi* to set aside this verdict and have a new trial.

Best, Serjt. shewed cause against the rule :

He first contended that none of the counts truly described the

† See Bills of Exchange Act, 1882, *Bank v. Wentworth*, (1880) 5 Ex. D. s. 64 (2); and *London and S. Western* 96, 103; 49 L. J. Ex. 637.—B. C.

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bill. Next he objected that the plaintiff had not proved the procuration of Staeben & Co. to have been given to Henry to indorse; so far from its being proved, there were strong indications that the name was fraudulently, if not feloniously, assumed by Henry. But though it has been held that an acceptance admits the drawer's hand-writing, and every thing else that is on the face of the bill, and must have been there when the drawee accepted, yet the acceptance does not admit those things which are on the back of the bill, and may or may not have been added after the acceptance.

Vaughan, in support of his rule :

It is sufficient to describe the bill in the declaration either according to its legal effect or according to the tenor. *Bass v. Clive*.† Therefore the third count is good, which states that certain persons using the firm of Staeben & Co. drew the bill, though only one person, Henry, in fact drew it. It is admitted that the acceptance proves the authority of Henry to use the name of Staeben & Co. to draw the bill. If the acceptance has proved that fact for one purpose, it has proved it for all the purposes of this bill. If Henry was authorized to draw, it is not too much for a jury to infer that he had a continuing authority to indorse. *Bass v. Clive* goes farther than this. Lord ELLENBOROUGH, Ch. J. says, "Is not the acceptor, before he accepts a bill, bound to know whether the drawer is an aggregate firm or not?" The authority being proved to be once given, must be presumed to continue, unless the contrary be proved.

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GIBBS, Ch. J. :

I cannot tell what private connection may subsist between these parties. I can look only to the instrument itself, and the manner in which it is declared on, Staeben & Co. who were once a firm, purport to authorize Henry to draw on the defendant. The defendant accepts the bill, and thereby admits that Staeben & Co. are existing, as they may be, as to him : he stands answerable to Staeben & Co. for paying to them the amount of that bill ; he admits that Henry, as the attorney of

Staeben & Co., had authority to draw that bill; but it does not appear at what date the indorsement was made, and the defendant has not admitted that Henry had a right to indorse that bill. The defendant may say, I did suppose that Staeben & Co. were an existing house, as they once were, and that they had authorized Henry to draw that bill, and I have made myself liable to them; but I have not admitted that the agent was authorized to indorse the bill.

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DALLAS, J.:

I am of the same opinion with respect to a conversation which was dwelt on in the argument: the defendant admitted that he was liable to the person entitled to recover on that bill, but he did not say who that person was. The plaintiff is not, therefore, entitled to recover.

PARK, J.:

The mere acceptance proves the drawing, but it never proves the indorsement: it is not at all necessary *that a power given to draw bills by procuration should enable the agent to indorse by procuration: the first is a power to get funds into the agent's hands, the other to pay them out. The case of *Smith v. Chester*† decides, that even if the indorsement be there, the acceptance does not admit the indorser's hand-writing, and that the acceptor is bound to look only to the face of the bill. I therefore agree with my Lord and my brother DALLAS, that my brother BURROUGH was right in directing this verdict.

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Rule discharged.

† 1 R. R. 345 (1 T. R. 654).]

SCHRODER AND ANOTHER v. THOMPSON.

(7 Taunt. 462—466; S. C. 1 Moore, 163.)

1817.
May 16.

[462]

A vessel chartered to a port of America laden with salt, to bring home a return cargo of timber, entered the port during an embargo, under which it was permitted her, upon the notification of the embargo, to return with the cargo on board, or to discharge her cargo, and return in ballast. She discharged her cargo, remained eighteen months there, till the embargo ceased, then shipped her homeward cargo, and was lost: Held, that she was not bound, with relation to the underwriters on ship, to have returned with her cargo of salt, or to have sailed in ballast, and that the underwriters on ship were still liable.

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THIS was an action upon a policy of insurance, at and from London to the ship's loading port or ports in Virginia, and back to London, with liberty to touch at St. Ubes; upon the ship *Bremer*. The cause was tried at Guildhall at the sittings after Hilary Term, 1817, before Dallas, J., when it appeared that the owner of the vessel had chartered her to Donaldson, to proceed in ballast to Norfolk in Virginia, and there to load a cargo of timber, and therewith proceed to London, for the freight therein mentioned: sixty-five running days to be allowed for loading at Norfolk and unloading in London, and the days on demurrage over and above the said lading days at 5*l.* 5*s.* per day: That on her way to Virginia, she should call at St. Ubes, *and there take a cargo of salt, with mats for dunnage, at the freight of 5*d.* per bushel for the salt, to be paid on delivery at Norfolk. The ship sailed from London in ballast, arrived at St. Ubes, shipped a cargo of salt, and therewith arrived at the port of Norfolk in Virginia on 30th January, 1808. By an Act of Congress, of 22nd December, 1807, "an embargo was laid on all vessels in the ports and places within the limits and jurisdiction of the United States, cleared or not cleared, bound to any foreign port, and no clearance was to be furnished to any ship bound to any such foreign port, except vessels under the immediate direction of the president of the United States. Provided that nothing in that Act should be construed to prevent the departure of any foreign ship, either in ballast, or with the goods on board of such ship, when notified of that Act. Armed vessels possessing commissions from any foreign power were not to be considered as

liable to that embargo." The *Bremer* finished discharging her cargo on 27th February. She was not an American ship, nor belonged to any native or any citizen of America, but was foreign to America, and the property of foreigners. Upon the ship's arrival, and during her stay in Virginia, the embargo enacted by that Act was in force there. The embargo was taken off on 4th March, 1809, but the ship was restrained by the act of the Government until 10th June, after which she took in a cargo, and on 13th August sailed for London with a cargo of timber, and was lost at sea. The defendants contended that the plaintiff was not entitled to recover, first, because, when, upon the ship's arrival at Norfolk, the embargo was found to subsist there, it was competent for her, being a ship foreign to America, either to have sailed in ballast after discharging her cargo of salt, or to have sailed with the cargo of salt, which she had on board when the embargo was first notified to her, either of which *things she was permitted to do by the proviso in the first section of the Act, but that it was not competent to the assured, in pursuit of their own purposes, voluntarily to submit themselves to the embargo, waiting for a cargo until that restriction should be taken off, and to subject the underwriters to a liability of an indefinite duration; secondly, that the vessel had staid an unreasonable time in the port of Norfolk, after the dissolution of the embargo. DALLAS, J., inclined to think that the assured were bound to sail when they discovered the existence of the embargo, or if not, that at least the ship ought to have sailed in ballast as soon as she had discharged her cargo of salt, but he reserved both these points: if she were not bound to either of these acts, he thought there was nothing unreasonable in the length of time which she had taken to procure a cargo, after the restraint on her sailing was taken off. The jury found that there had been no unreasonable delay in the last-mentioned particular, and, subject to the points reserved, they found a verdict for the plaintiffs for a total loss.

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v.
THOMPSON.

[*464]

Lens, Serjt., in this Term had obtained a rule *nisi* to set aside this verdict, and enter a nonsuit.

SCHRODER
v.
THOMPSON. [After argument upon the rule, the Court took time for consideration.]

[466] GIBBS, Ch. J., now delivered the judgment :

The Court have looked very attentively into the facts of this case, and are of opinion, on due consideration of all the circumstances, that there is no ground to disturb this verdict: they think the ship was entitled to come home at the risk of the underwriter, and that at the time of the loss the ship was still protected by the insurance.

Rule discharged.

1817.
May 16

WILLIAMS v. MARSHALL.

(7 Taunt. 468—472; S. C. 1 Moore, 168.)

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Under a licence to export to a hostile country within a limited time, a ship clearing at the Custom-house in London on the day before the licence expires, but delayed in the river by the breaking of a bowsprit, and consequently not obtaining her clearing note at Gravesend till two days after the expiration of the licence, is not deemed to have exported within the time limited.

If a ship, licensed to export to a hostile country, do not sail within the time limited by the licence, though she were delayed by an accident, she is not protected by the licence.

Difference between a licence to export and a licence to import: the former, if the time elapses, must be renewed, because the parties, being at home, can easily apply to renew.

[SECOND trial, before GIBBS, Ch. J., of an action on a policy of insurance for a voyage from London to Amsterdam, a hostile port. The facts proved at the former trial † were, that a licence for the voyage had been obtained, to continue in force “until the 10th of September, for exporting.” The ship cleared at the London Custom-house on the 9th of September, but did not arrive at Gravesend until the 12th of September. She there obtained the clearing-note, which is necessary to entitle the master to be paid the drawback on exportation. The further facts proved on the second trial were], that on the ship's

† Reported, 6 Taunt. 390.

passage down the river she broke her bowsprit, and lost a whole day in repairing it, but for which accident she might have reached Gravesend on the 10th of September.

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GIBBS, Ch. J., held, that the passing the Custom-house was no exportation, which point he had the authority of the late lamented Chief Baron THOMSON for saying that the Court of Exchequer had expressly decided in the case of *The Attorney-General v. Pougett*,† and he accordingly nonsuited the plaintiff.

Upon granting a rule *nisi*, for setting aside the nonsuit in the case of *Tulloch v. Boyd*,‡ the Court thought fit to open this case also, and granted a rule *nisi* for a new trial, to abide the event of the decision of the special verdict in that case, upon the single point whether the assured were still entitled, when he sailed, to the benefit of the licence; but they refused to open the question, whether the ship's passing the Custom-house in London were an exportation, declaring that question to be finally settled by their former decision * in this case, and by the case of the *Attorney-General v. Pougett*.†

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The cause was afterwards in this Term spoken to by *Shepherd*, Solicitor-General, (and *Best*, Serjt. was with him) for the plaintiffs, and by *Lens* and *Copley*, Serjts. (and *Vaughan*, Serjt. was with them,) for the defendants.

For the defendant it was argued, that the assured possessing a licence which authorized him to sail within a certain limited time, and not sailing within the time, it was his own omission and his own fault that he has not procured another licence. What he did at Gravesend was by no means immaterial, but was essential: the ship had not sailed, till she quitted Gravesend. * * The question merely was, whether, because a trader had a licence three days before, he therefore necessarily had a licence three days after. The law of licence had been relaxed to every extent which justice or utility required, but no reason required that it should be extended to this case. If a licence being once given, no other licence could ever be given, there might be more reason for unbounded indulgence, but here that reason exists not. It is equivalent to making a licence mere waste paper, to say that, whether it has expired or

† 17 R. R. 531 (2 Price, 381).

‡ See next case.

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not, if the ship sails near the time of the licence expiring, it is sufficient. Upon that construction the grant of a licence for any small time is equivalent to a grant of a licence for a larger time, which it is not. *The Attorney-General v. Pougett* was not in point: it turned on the meaning of the word "export," where certain duties were concerned, and *though it is in the defendant's favour, as far as it goes, yet the defendant did not rely on it. It was there held, that the ship had not exported, though she had departed from London. It decides, that an exporting has not taken place, until every thing is done, the want whereof can hinder a ship from going. That case was the converse of this: there the ship had every thing which was requisite, but had not moved from the port; here the ship had moved, but had not every thing requisite. The decision of the Court there is, that though the ship has all those things, she must actually move from her place; and the Court will decide here as they decided there. The argument in that case turned on the meaning of the word export. All the Court were unanimous that the hides were put on board for the purpose of exportation, but that they were not exported; and the officers of the crown held it so clear, that they refused their fiat for a writ of error. Under the present circumstances there is no ground why the time should be enlarged. It is not for the party to determine whether a new licence shall be granted or not. There is no reason for referring this question to the party's own decision, when there is an opportunity of going to the privy council for another licence.

For the plaintiff, it was argued, that there was a marked distinction between this case and *The Attorney-General v. Pougett*. The facts on which the Court of Exchequer gave judgment, were put on the record, and their judgment was and must have been confined to the questions which arose thereon. If those who drew that plea had ventured to state, that after the goods were entered and shipped, and before the day when the new duty was to attach, the ship had taken in all her cargo, and cleared at the Custom-house at London, the Attorney-General would not have demurred, but taken issue on the question of fact, and let the law arise afterwards. *That case therefore was not like this. Whether a writ of error should be granted, must depend, like

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the demurrer, on the facts stated on the record, which merely stated the putting of the goods on board to be exported at a future time; but in the present case every thing was done which was to be done by the ship before sailing. It is merely for security that the payment of the drawback is deferred till the cocket is given at Gravesend, but if a ship were to be lost between London and Gravesend, it does not therefore follow that she should not have the cocket. If the Legislature had fixed Sheerness for the place of paying the drawback, it might with equal reason be said, that ships within the body of the counties of Kent and Essex, as they are, till they have cleared Orfordness, and the North Foreland, have not yet sailed. A vessel in ballast calls not at Gravesend for a cocket; nor, if the goods exported do not entitle the exporter to a drawback, need a laden vessel call for a cocket. In many cases of licences to import, it has been held that the party is protected, though the ship do not arrive till long after the licence has expired; nay, in some cases the protection has continued where the ship had never, as in *Effurth v. Smith*,† begun her voyage till the whole time was expired. Here, if the ship had cleared and passed Gravesend, on the 9th, only three days earlier, she would have been in good time, within the decisions on the homeward licences. She not only cleared the Custom-house on the 9th, but sailed from London on the 9th. In all cases of not importing within the time of the licence, the party might get a renewal thereof.

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GIBBS, Ch. J.:

The cases of outward and homeward licences are not at all alike. In the first place, the new licence obtained here would not operate upon the acts *that pass in the interval between the expiration of the old licence and the commencement of the new one. This difficulty did arise in one case. In the next place, the parties here cannot know what is passing in the minds of the navigators abroad, nor what the reasons were for their conduct.

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Cur. adv. vult.‡

† 5 Taunt. 329.

‡ For the final judgment of the Court, see p. 549, *post*.

TULLOCH *v.* BOYD.1817.
May 16.

(7 Taunt. 472—476; S. C. 1 Moore, 174, Holt, N. P. 487.)

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A licence to export must be more strictly conformed to than a licence to import.

Licence for two vessels, navigated in any manner, and sailing under any flag, to proceed from England to Holland with specified goods, to cruize from one port of Holland to another, to land or load part of their cargoes at one or more places as might be most suitable, and having completed their cargoes of specified goods, to proceed with the same to England; the licence to be renewed on application by the parties at the return from each voyage, during six months. The exporter, fearing the vigilance of the government in Holland, where his trade was contraband, delayed to export, until after the expiration of six months, and then sailed and was lost. Held, that the parties being in this country, and not applying for a renewed licence, the adventure was not legalized by the original licence; and an assurance thereon was void.

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THIS was an action upon a policy of insurance at and from London. Upon the trial of this cause at Guildhall, at the sittings after Trinity Term, 1816, before Gibbs, Ch. J., it was proved that the plaintiff had procured a licence from the King in council, whereby, after reciting that the plaintiff had represented on behalf of himself and other British merchants, that he had purchased two vessels for the purpose of trading between this kingdom and Holland, and prayed His Majesty's licence for six months, permitting the said vessels, navigated in any manner, and sailing under any flag, to proceed from any port of England to any port on the coast of Holland, with indigo and other goods allowed by the order of council of 11th November, 1807, to be exported, with permission to cruize without molestation from one port of the coast of Holland to another, *and to load or land part of their cargoes at one or more places as might be most suitable; and having completed their inward cargoes, consisting of such goods as were allowed by that order to be imported, to proceed with the same to any port in England, the Crown granted permission to such two vessels, laden as aforesaid, to make one voyage and return to any port of this kingdom north of Dover, on condition that the names and tonnage of the vessels should be indorsed at the back of that licence at the time of clearance: that licence to be renewed, on application by the parties at the return to this

kingdom from each voyage during the term of six months from that date, 2nd July, 1808. The plaintiff's ship cleared outwards at the Custom-house on 19th December, 1807: he about that time received advices that the douaniers on the coast of Holland were very vigilant, and the state of things very bad abroad: the plaintiff therefore detained the ship and cargo until 19th January, 1808, when the ship sailed, the licence being then expired and not renewed. On the 20th January, she cleared at Gravesend, she sailed and was captured. GIBBS, Ch. J. thought, that in this case, where, the vessel having her papers on board, the assured had chosen to delay her on account of the danger which he apprehended, he was not entitled to the benefit of the expired licence as if it were still existing; and here, inasmuch as the ship had not even sailed from London when the licence expired, he thought it was a case clearly not within the protection of the licence, and directed a nonsuit.

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Shepherd, Solicitor-General, in Michaelmas Term last, moved for and obtained a rule *nisi* to set aside the nonsuit and have a new trial. He cited *Effurth v. Smith* † *and *Williams v. Marshall*.‡ He contended that whether the circumstance that the ship had not performed her voyage within the time prescribed by the licence, arose from her not having completed, or from her not having begun, her voyage within the time, made no difference in the principle: this doctrine had been recognized in *Williams v. Marshall*. And whether her delay was occasioned by an inevitable cause, or a justifiable cause, in all actions on policies was immaterial. *Driscoll v. Passmore*.§ There is no sound foundation for the distinction whether the ship be abroad or at home when the licence expires. A British merchant has always the same opportunity to apply for a prolonged licence to come home, as for a prolonged licence to sail, but it has never yet been held necessary so to do. In *Effurth v. Smith* there was abundant time for such an application, and so is there in all cases where the licence expires before the ship arrives. The plaintiff, therefore, brings himself within the spirit of the same excuses for not

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† 5 Taunt. 329.

also 6 Taunt. 390.

‡ See the last case, p. 542, *ante*, and

§ 4 R. R. 782 (1 Bos. & P. 200).

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literally observing the licence, which have been there admitted. In the greater part of these cases the ship has been coming to England. In the case of the *Mars*, in the Court of Admiralty, not reported, it is said that the ship had not sailed when the licence expired, yet the Court of Admiralty ordered restitution of the ship and cargo.

The Court expressed a desire that the circumstances of that case should be ascertained and fully stated: without that authority there was nothing but the strong desire they felt to protect an insurance effected without fraud, which could make them hesitate a moment in refusing this application. They granted a rule *nisi* upon the terms that the case should be made a special verdict.

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Lens and *Best*, Serjts., on a former day in this Term, shewed cause against this rule. This case is one where the merchant detains the ship upon his own discretion and views of convenience, constituting himself the sole judge whether the licence shall last longer. One of the reasons for the delay, proved at the trial, was, that it was prudent to have dark weather for this, which, as to the enemy, was a contraband voyage; so that the assured foresaw, for weeks beforehand, whether he should want a renewal of the licence. And, by a clause in the licence, the licence is to be renewed after every trip, though it gives six months' time to make one voyage. This is not merely a private case: it is a general concern to preserve our shipping; and though the owner may choose to risk his ship on an enemy's coast in light nights, yet the government is interested in preventing the loss and chooses to exercise a check. The case of *The Attorney-General v. Pougett* † does recognize a principle which applies here, but, independently of that authority, this is a much stronger case than *Williams v. Marshall*, and the assured cannot take a month after the expiration of the licence before he makes his voyage.

Shepherd, Solicitor-General (and *Vaughan*, Serjt. was with him), endeavoured to support the rule. The clause for renewal

† 17 R. R. 531 (2 Price, 381).

of the licence before a second voyage makes no difference in the liberal construction which ought to prevail as to the first voyage. It is agreed that a party cannot unreasonably and capriciously extend his licence to any other time.

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Cur. adv. vult.

WILLIAMS v. MARSHALL.

TULLOCH v. BOYD.

GIBBS, Ch. J. now delivered the decision of the Court :

In the former of these cases it is unnecessary to give *judgment, for we already have given it; but in the case of *Tulloch v. Boyd*, we were informed, that the very learned Judge who presides in the Court of Admiralty, had just then decided the reverse in that Court. We therefore opened the rules in both these causes, for further argument: no such case, however, has been presented to us, and there is no reason to desert our former judgment; and the rule in both cases must be

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Discharged.

PEELE AND OTHERS, ASSIGNEES OF WADDINGTON,
A BANKRUPT, v. NORTHCOTE.†

(7 Taunt. 478—485; S. C. 1 Moore, 178.)

1817.
May 16.

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A broker, indebted for premiums of insurance on policies subscribed by an underwriter who had since become bankrupt, had a *del credere* commission on one of the policies, effected in the name, not of the broker, but of the assured, and expressed in the body thereof. The broker was not entrusted with the custody of the policy. A loss happened before the bankruptcy; and, before the commission, the broker paid the loss to the assured: Held, that he could not set off that loss against the premiums due to the assignees of the bankrupt.

THIS was an action of *indebitatus assumpsit*, brought to recover divers premiums of policies of insurance subscribed and caused to be subscribed by Waddington, a bankrupt, before his bankruptcy, for the defendants. The defendants gave notice of a set-off. The cause was tried at Guildhall, at the sittings after Trinity Term, 1816, before Gibbs, Ch. J. It was admitted that Waddington, who was declared a bankrupt under a commission dated 25th March, 1815, had before his bankruptcy underwritten policies for

† See *Houstoun v. Robertson*, 16 R. R. 655, and note there, p. 657.—R. C.

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the defendants, who acted in the character of insurance brokers, and also effected policies on property of their own; and the defendants were indebted to him at the time of his bankruptcy in 216*l.* for premiums, and he was indebted to them in returns of premiums before then allowed on several policies, in 81*l.* 9*s.* 2*d.* One of the policies was effected on 7th November, 1814, by the defendants as the brokers for Brown, Weston & Co., and the bankrupt, by Mounsher, his agent, subscribed it for 200*l.* The policy expressed that Brown, Weston & Co. for *themselves and as agents, as well in their own name, as in the name and names of all and every other person, to whom the same did, might, or should appertain, effected that insurance from Stockholm to Pernambuco, on the *Prince Oscar*, with liberty to touch and stay at any ports whatever; next after which passage followed a declaration that "it was agreed that the broker should guarantee the underwriters thereon, without prejudice to that insurance." The goods insured by that policy were shipped on board the *Prince Oscar*, and Brown, Weston & Co. were interested therein to the full amount of the money insured thereon. A loss of 97*l.* 3*s.* 3*d.* per cent. on those goods happened on 28th February, 1815, which had been adjusted by all the underwriters with the exception of the bankrupt, by whom it had not been adjusted, further than by the following memorandum indorsed on the policy, by Mounsher, as his agent, subsequent to the bankruptcy, viz. "Admit to prove 194*l.* 6*s.* 6*d.* under the estate of H. Waddington, W. Mounsher." It was proved that the defendants had in August and September preceding paid Brown and Weston very considerable sums, including the loss in question. It was proved that the policy (which was not effected in the name of the broker) remained in the hands of the assured; and the defendants never had the custody of it until the assured called for and received the loss from the defendant; and upon enforcing the contract of guaranty against him, they sent him the policy. Under these circumstances the plaintiff insisted that the defendant was not entitled to set off this loss against the premiums due. GIBBS, Ch. J. thought that the defendant shewed no pretence to entitle him to a set-off, except his commission *del credere*, which he thought was not attended with that effect, but he reserved that

point, subject whereto the jury found a verdict for the plaintiff for 184*l.* 10*s.* 10*d.*

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v.
NORTHCOTE.

[A rule *nisi* having been obtained to set aside the verdict and enter a nonsuit, the rule was argued, and the Court took time for consideration.]

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GIBBS, Ch. J. now delivered the judgment of the Court :

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This is a question whether a broker had a right to set off a loss against premiums of insurance due to the assignees of a bankrupt upon policies subscribed by him before his bankruptcy. The facts were, that the broker was to guarantee all the underwriters for a *del credere* commission, and was therefore, it is quite clear, liable only in the second instance to make good the loss in case a loss should arise. Before the bankruptcy of the assured, the broker was called on to pay the loss to him, and did pay it; and the question is, whether this be either a mutual debt existing at the *time of the bankruptcy, or a mutual credit. That it was not a mutual debt, is clear from this circumstance; it had not been paid before the bankruptcy. The only question therefore is, whether it was a mutual credit. If this policy had been effected in the name of the broker, it might have ranged itself under a class of cases, which have been decided, whether rightly or not, I do not now say: if it had been left in the hands of the broker, it would have ranged itself under another class of decided cases. But the broker pays this loss simply on his commission *del credere*; and leaving the case there, we think it quite clear, that it is neither a mutual debt, nor a mutual credit. But what is supposed to distinguish this case from all others, is, that the underwriters are parties to the agreement by which the broker guarantees to the assured the solvency of the underwriters. That is a trust, it is argued, given to the broker; and that if the broker pays, he has his action on the agreement of the underwriter, to recover back that sum from him. That question depends on the construction of this instrument. The broker is agent for both parties to certain purposes, but with respect to guaranteeing the underwriters, no one is interested in that but the assured, who pays him, for so doing, his commission *del credere*.

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The broker does hand over to the assured a policy containing a memorandum that the broker will guarantee the underwriters, but no one is interested therein except the assured, and the instrument is only to be considered as evidence of an agreement between the broker and the assured, and the case stands on the common circumstance of money paid by a broker to the assured, under a commission *del credere*, and under those circumstances we think the broker is not entitled to set off these premiums against the losses due from the underwriter; the rule therefore must be

Discharged.

1817.
 May 17.

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HINDMARSH v. CHANDLER.

(7 Taunt. 483; S. C. 1 Moore, 250.)

If a minor defendant appears by attorney, the Court will, at the instance of the plaintiff, compel an amendment of the appearance by substituting a guardian.

THE defendant, who was a minor, and was sued as administratrix, had appeared in this action by attorney, and *Best*, Serjt., for the plaintiff, had obtained a rule *nisi* to set aside that appearance, and that the defendant should name a guardian, and appear by such guardian.

Pell, Serjt. shewed cause against this rule, upon an affidavit that the letters of administration were revoked, in consequence of the discovery of the defendant's infancy, which, until lately, had not been known to her attorney; and that administration *durante minori ætate* had since been granted to another. It was therefore unnecessary that the defendant should appoint a guardian to defend a suit to which the defendant was no longer liable.

Best, in support of his rule, urged, that the defendant was administratrix when the suit was commenced, and he was therefore entitled to the rule.

Per CURIAM :

The defendant must appear as she ought to have done, by guardian, but she is to be at liberty to plead *de novo*.

Rule absolute.

DEANE v. CLAYTON.†

(7 Taunt. 489—536; S. C. 1 Moore, 203, 2 Marshall, 577.)

1817.
May 17.

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The defendant was owner and occupier of a wood adjoining a wood of B., divided therefrom by a low bank and a shallow ditch, not being a sufficient fence to prevent dogs from passing from B.'s wood into the defendant's wood. There were public footpaths through the defendant's wood, not fenced off therefrom. The defendant, to preserve hares in his wood, and to prevent them from being killed therein by dogs and foxes that came thereinto in pursuit of hares, kept iron spikes screwed and fastened into several trees in his wood, each spike having two sharp ends, and so placed that each end should point along the course of a hare-path, and purposely placed at such a height from the ground, as to allow a hare to pass under them without injury, but to wound and kill a dog, that might happen to run against one of the sharp ends thereof, the spikes being, from their nature and positions, adapted to effect the purpose for which the defendant fastened them there: none of them was at a less distance than 50 yards from any footpath, and some were from 150 to 160 yards distant therefrom. The defendant kept notices painted on boards placed at the outsides of some parts of the wood, that steel-traps, spring-guns, and dog-spikes were set in that wood for vermin. The plaintiff, with B.'s permission, was sporting in his wood, with a valuable pointer; a hare rose in his wood, and was pursued by the dog thereout, over the bank and ditch, into the defendant's wood, and in the pursuit, there ran against one of the sharp spikes, and was killed. The plaintiff endeavoured as much as in him lay to prevent his dog from pursuing the hare into the defendant's wood, but was unable so to do. The plaintiff having brought an action upon the case against the defendant to recover a compensation for the loss of his dog, the Court of Common Pleas were equally divided in opinion whether the action were maintainable, GIBBS, Ch. J. and DALLAS, J. holding that it was not, and PARK and BURROUGH, Js. holding that the plaintiff was entitled to recover.

THE plaintiff, in Hilary Term, 54th Geo. III. declared in this Court in case, for that whereas, before and at the time of the committing the grievance by the defendant, as hereinafter men-

† See *Jordin v. Crump* (1841), 8 M. & W. 782, where the opinion of Gibbs, C.J., in the principal case, was followed; *Ponting v. Noakes*, '94, 2 Q. B. 281, 10 R. 265, 63 L. J. Q. B. 549. Although upon the general principle of the Revised Reports this case might have been omitted as containing no final decision, it is judged proper to report it as containing an elaborate exposition of the arguments upon a difficult question of principle. So far

as these engines are intended and may be effectual to injure dogs, they are not struck at by the Act 7 & 8 Geo. IV. c. 18, re-enacted by 24 & 25 Vict. c. 100, s. 31. But this legislation has doubtless tended to discourage the practice. If a trespasser should chance to have grievous bodily harm inflicted on him by a dog-spear, the consequence is so obvious that it could hardly be denied to be intentional.—R. C.

DEANE
C.
CLAYTON.

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tioned, the plaintiff was going and passing in, upon, and over a certain wood, or parcel of land, adjoining a certain other wood, or parcel of land, of the defendant, and separated and divided therefrom by a certain mound or bank of earth, in the parish of Lewkner, county Oxford, with a certain dog of the plaintiff of great value, (to wit) of the value of 50*l.*, and he the plaintiff so going and passing in, upon, and over the first-mentioned wood, piece, or parcel of land, with his dog as aforesaid, afterwards, and before the time of the committing of the grievance, *a hare started and jumped up in the first-mentioned wood or parcel of land, in the sight and view of the plaintiff's dog, and the hare then and there ran in and along the same wood, or parcel of land, over the said mound or bank of earth separating and dividing the same wood from the defendant's wood, or parcel of land, and unto and into the defendant's wood, in and along a certain hare-path in the same, and the plaintiff's dog then and there immediately followed and ran after the hare, in and along the first-mentioned wood, over the mound or bank of earth, and then and there, against the will and inclination of the plaintiff, ran unto, and into the defendant's wood, in and along the said hare-path in the defendant's wood, in pursuit of the hare, yet the defendant, wrongfully, injuriously, and maliciously, and intending to injure, prejudice, and aggrieve the plaintiff in this behalf, and to wound, kill, and destroy his dog, and wholly to deprive him of the same, wrongfully and injuriously put, placed, drove, and fixed, and caused and procured to be put, placed, driven, and fixed unto, and into divers trees, and pieces of wood, standing and being in, upon, and near to divers parts of the said hare-path and other hare-paths in the defendant's wood, divers nails, spikes, and iron instruments of great length, to wit of the length of two feet respectively, and for the purpose, and with the intent to kill, wound, and destroy any dog or dogs, running in and along the said hare-paths, or either of them, by means whereof the plaintiff's dog in following, pursuing, and running after the said hare, in and along the said hare-path in the defendant's wood, necessarily and unavoidably, and with great force and violence, ran and was forced upon and against the said nails, spikes, and iron instruments; and thereby

the dog then and there became and was greatly lacerated, wounded, *and injured, and thereby the plaintiff's dog, being of the value aforesaid, afterwards died, and became and was wholly lost to the plaintiff. There were other counts, which it is not material to state. The defendant pleaded not guilty.

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v.
CLAYTON.
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This cause was tried at the Oxford Spring Assizes, 1814, before Dallas, J., when a verdict passed for the plaintiff, damages 15*l.*, subject to a point which the learned Judge, on the authority of *Townsend v. Wathen*,† reserved, whether the action would lie.

Accordingly *Shepherd*, Solicitor-General, in Easter Term, 1814, obtained a rule *nisi* to set aside the verdict, and have a new trial.

In Michaelmas Term, 1815, *Vaughan*, Serjt., with whom *Best* also was of counsel, shewed cause, citing 2 Ro. Ab. 566. Trespass, K. pl. 1. Co. Dig. Pleader, 3 M. 31. *Mitten v. Faudrye*, Poph. 161. S. C. W. Jo. 131, by name of *Millen v. Fawtrej*; S. C. Latch. 13, by name of *Millen v. Hawery*, and 119, by name of *Millen v. Fawdry*. *Beckwith v. Shordike* and another, 4 Burr. 2092. *Dymock v. Allanby*, Lincoln Spring Assizes, 1809 or 1810, cor. Bayley, J., *Vere v. Lord Cawdor*, 11 East, 568; † *Wright v. Ramscott*, 1 Saund. 84, S. C. 1 Siderf. 336. *Churchward v. Studdy*, 14 East, 249. § *Sutton v. Moody*, 1 Ld. Ray. 250. S. C. 2 Salk. 556. 12 Hen. VIII., fol. 9. *Reynell v. Champernoon*, Cro. Car. 228. *Corner v. Champness*, Taunton Spring Assizes, 1814, cor. Dampier, J. *Townsend v. Wathen*; † 2 Ro. Ab. 548, pl. 5. *The King v. The Bishop of Bangor*, cor. Heath, J.

Lens, Serjt., in the same Term, with whom *Shepherd*, Solicitor-General, was also of counsel, was heard in support of the rule. In the course of his argument he cited **Brock v. Copeland*, 1 Esp. 203. || Stat. 21 Jac. I. c. 16, s. 5. *Barrington v. Turner*, 3 Lev. 28. *Sutton v. Moody*, 1 Com. 34.

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† 9 B. R. 553 (9 East, 277).

† 11 B. R. 268.

§ 12 R. R. 513.

|| 5 B. R. 730.

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The COURT took time to consider ; and in the same Term, they directed that the case should be turned into a special verdict, and that it should be again spoken to.†

Consequently, in Easter Term, 1816, the special verdict, being drawn up, was argued by *Best*, Serjt. for the plaintiff, and *Bosanquet*, Serjt., for the defendant.

Best cited, in addition to the authorities referred to on the former occasion, *Tyrringham's* case, 4 Co. Rep. 38 b. 5th res. *Anonymous*, cor. Mansfield, Ch. J. Guildhall, case against the owner of an ox, which was driven from Essex to London for sale ; it was tranquil when it left home, but being fevered by the journey, it gored the plaintiff in Whitechapel, and held the action lay not.

Bosanquet cited, in addition to the former cases, *Wadhurst v. Damme*, Cro. Jac. 44. *Butterfield v. Forrester*, 11 East, 60. *Blithe v. Topham*, Cro. Jac. 158, 9. S. C. 1 Ro. Ab. 88, pl. 4, line 30. Bro. Abr. Trespass, pl. 345. 2 Ro. Abr. 565, Trespass. Justification, I. pl. 7. Ibid. 568. Trespass excusable, N. pl. 2. Foster, 262, 8. 4 Bl. Com. 192. Kel. 40. 3 Inst. 57. §

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The special verdict stated, that before and at the time in the declaration mentioned, the defendant was the owner and occupier of certain woodlands situate in the parish of Lewkner, in the county of Oxford, being parcel of a large tract of woodland there, and which woodland of the defendant adjoined on one part to certain woodland belonging to and in the occupation of one

† *Chambre*, J. resigned, and *Heath*, J. died, in the interval between the directing of the second argument, and the hearing thereof, and were succeeded by *Park* and *Burrough*, Js.

‡ 10 R. R. 433.

§ It causes sensible regret to forego the opportunity of recording any portion of the learning, acuteness, and talent, by which each of the arguments on this novel and interesting question was distinguished ;

but inasmuch as the principal topics are touched on in the elaborate opinions which were delivered by the Court, and the publication of the whole would extend this case to an unusual length, it is thought expedient to omit the arguments of the counsel.

— Fugit irreparabile tempus, Singula dum capti circumvectamur amore.

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Joseph Townsend, Esquire, other parcel of the said large tract, and which woodland of the defendant was divided from Mr. Townsend's woodland by a low bank or mound of earth, and a shallow ditch, such bank or mound and ditch not being a sufficient fence to prevent dogs from passing from Mr. Townsend's woodland, into the defendant's woodland: that for a long time before, and also during all the time of the defendant's possession of his said woodland, there were certain public foot-paths through the said tract of woodland, and through the defendant's part thereof, which public foot-paths were not fenced off from the land through which they respectively led: that before the time in the declaration mentioned, the defendant, being possessed of his said woodland, in order to preserve hares therein, and to prevent them from being killed therein by dogs and foxes, did, for the purpose of wounding and killing dogs and foxes that might come into his said woodland in pursuit of hares, caused several iron spikes called dog-spears, to be screwed and fastened into several of the trees in his said woodland, and did also for the same purpose keep the said spikes so screwed and fastened there, until and at the time in the declaration mentioned, the said spikes having each two sharp ends, and being so placed, as that each end should point along the course of some one of these tracts of the woodland which were frequented by hares, called hare-paths, and being also purposely placed at such a height from the ground as to allow a hare to pass *under them without injury, but to wound and kill a dog that might happen to run against one of the sharp ends thereof, the said spikes being from their nature and positions adapted to effect the said purpose for which the defendant caused them to be screwed and fastened into the trees, and kept there, as before mentioned: that no one of those spikes was kept at a less distance than 50 yards from any one of the said public foot-paths, some of them being at the distance of 150 yards, and others at intermediate distances between 150 and 160 yards. That before the time in the declaration mentioned, the defendant caused notices to be painted on certain boards, placed at the outside of some parts of his said woodland, in the following words, viz.: "Take notice that steel-traps, spring-guns, and dog-spikes, are set in

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these premises, and steel-traps are set in this wood for vermin," meaning the defendant's said woodland: that such boards and notices remained in their places at the time mentioned in the declaration: that on the day mentioned in the declaration, the plaintiff, by the consent and permission of Mr. Townsend, went into his woodland for the purpose of sporting, accompanied by a pointer dog of the plaintiff's, of the value of 15*l.*, being the dog mentioned in the declaration: that while the plaintiff was in the last-mentioned part of the woodland, accompanied by his dog, for the purpose, and with the permission before mentioned, and near to the defendant's woodland, a hare rose in Mr. Townsend's woodland, which was immediately seen and pursued by the dog: that the hare ran, and was pursued by the dog, out of Mr. Townsend's woodland, over the said mound or bank, and ditch, into the defendant's woodland; and the dog, so pursuing the hare in the last-mentioned woodland, ran against one of the sharp ends of the said spikes, and was thereby wounded and killed: that the plaintiff *endeavoured, as much as in him lay, to prevent his dog from pursuing the hare into the defendant's woodland, but was unable to do so. But whether, &c.; and if upon the whole matter it should appear to the Court, that the defendant was guilty of the premises in any one of the counts of the declaration mentioned, then the jury found the defendant guilty of the premises in that count mentioned, and assessed the damages at 15*l.*, and that he was not guilty on the other counts.

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The Court having taken time until this day to deliberate, and being divided in sentiment, now delivered their opinions *seriatim*.

BURROUGH, J. first stated the declaration and the special verdict:

This case had been argued before I had a seat in the Court. The novelty and difficulties attending it had suggested the propriety of further consideration. A second argument was therefore directed, which has taken place in my time. Finding that able Judges appeared to entertain opinions on the subject which did not accord with impressions made on my mind, I have read

every case, which, in the course of these arguments, was cited at the Bar, I have examined, as far as I have been able, the grounds on which they were decided, and I have given the facts stated in the special verdict the fullest consideration, before I formed my ultimate opinion. Pursuing this course, I have treated the judgments of those who differ from me with the greatest respect; and, had my mind at length been left in a state of doubt, my knowledge of the opinions which others entertained would have led me to believe that I had formed an erroneous judgment; but having no doubt on the subject, it is my duty to deliver my opinion. It is a great consolation to me that mine will not be a single opinion on the occasion. *In questions, the decision of which depends on the principles of the common law, and which are attended with difficulty and doubt, I have been used to look forward to the consequences which must result from the decision. If great inconveniences will result from one decision, which may be avoided by a different course, I think that the Court ought, before it decides, to be satisfied that the law is clear, and that it imperatively calls for a decision which will produce these inconveniences; to this extent only do I suffer the idea of inconvenience to affect my mind. The wisdom of ages has in England perfected and established a system of law called the common law; this law is adapted to the general regulation of the conduct of the subjects as members of society; its principles, if accurately attended to, will be found all to point to that end. If the common law of England says, (as contended for by the defendant,) that he may erect, and keep erected in his open and uninclosed close, for the preservation of hares, these instruments, calculated to wound and destroy, and with intent to wound and destroy, all dogs which may come into that close in pursuit of hares, I know this must be founded on a supposed right to protect the species of property he has in the hares in his close, although the injury done to him would merely be a trespass. If this be law, then it will follow, as an unavoidable consequence, that any man, the occupier of a close so circumstanced, may erect or place in it any instruments, however dangerous, to prevent any man, or his cattle, from trespassing on his close, with intent to wound and

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injure him or his cattle, who may chance to enter on the close, although a mere trespass is thereby committed; and this, although the same common law has provided apt remedies for every injury he may sustain by such entry. An action for damages may be sustained against the man, for the damage done by himself or his *cattle, or the cattle may be distreined, (but not killed or wounded,) for the damage done. I admit in the fullest terms, that if the owner of the close were, to tell A. that such instruments were placed, and he were, notwithstanding, wilfully to run against them, that he could not complain of the injury in a court of law. The special verdict in this case does not state that the plaintiff, or Mr. Townsend, had notice of what was done by the defendant. If such a fact had been material, it ought to have been positively found; but circumstanced as this case is, I conceive it not to be material. The defendant must, I conceive, mean to contend, that he has a right to do what he has done, as against all mankind. In the case on this record, he contends that he is justified as against one, who is, by the permission of Mr. Townsend, lawfully sporting on his land; and, in effect, as against Mr. Townsend, who is circumstanced in every respect as the defendant is; and this, although Mr. Townsend may be thereby interrupted in the same uses and enjoyments of his land and the hares therein, which the defendant claims to be entitled to. I cannot find any principle of the common law which clearly warrants this. What the defendant is found to have done must be carefully distinguished from things done to guard a dwelling-house, and enclosed property occupied with it, from the depredations of robbers, of persons who come thither for the purposes of committing felony, and from persons who come thither for the doing such violence to man as would amount to a breach of the peace, and be indictable as such. In *Brock v. Copeland*, cited at the Bar, the defendant, a carpenter, kept a dog for the protection of his yard, and for that purpose let it loose at night; Lord KENTON, on that occasion said, "Every man has a right to keep a dog for the protection of his yard." I mention this, only as an instance; any other species of protection may be resorted *to; and persons who enter for plunder, have no right to complain, if damage is

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done to their persons. They are criminal wrong-doers, who enter for the purpose of committing felony or breaches of the peace. Having said this much by way of introduction, I will state more distinctly the principles which govern my judgment. First, I am of opinion, that the acts of the defendant stated in the special verdict were unlawful, and that the plaintiff, having sustained an injury thereby, without any default in him, is entitled to maintain this action. Secondly, I am of opinion, that if the plaintiff had been a trespasser, or otherwise in default, by the entry of his dog on the defendant's premises, as stated in the special verdict, the defendant could in no manner have justified the direct killing of the dog. Thirdly, I am of opinion, that he cannot justify doing that indirectly, which he would have not been warranted in doing directly. As to the first of these propositions, that the acts of the defendant stated in the special verdict were unlawful, and that the plaintiff, having sustained an injury thereby, without any default in him, is entitled to maintain his action. After stating the situation of the defendant's and Mr. Townsend's property, the verdict states, that the defendant, in order to preserve hares in his woodland, and to prevent them from being killed therein by dogs and foxes, did, for the purpose of wounding and killing dogs and foxes that might come into his woodland in pursuit of hares, cause the instruments to be erected in the hare-paths in his wood, so as to wound or kill any dog that should happen to run against them; and being, from their nature and position, adapted to effectuate the said purpose for which they were screwed and fastened to the trees. The principle of *Sic utere tuo, ut alienum non lædas*, is familiar to every one. In a very useful book, Jacob's Law Grammar, in *which many principles of the common law are collected, I find the same principle stated more fully, and in a manner which more clearly shews its true meaning. It there runs thus: *Prohibetur ne quis faciat in suo, quod nocere possit in alieno; et sic utere tuo, ut alienum non lædas*. This principle is, in all its parts, restrictive of the use a man may make of his own property. It shews he is not to make *any use* he pleases of it, but that he is so to use it, as not thereby to injure another: he must look forward to the situation

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of others. Another may be injured in his person or his property: he is not to injure another in the enjoyment of his rights or property. Every case of (what is ordinarily called) nuisance, which is injurious to another in the enjoyment of his property, whether by setting up a noxious trade, a noisy occupation, or by erecting a building which darkens another's lights, is an instance fully within the rule, and governed by it. Intention to cause the injury is not the governing feature of all these cases, although it may in many cases of the kind be an important fact: if the thing be done, and the injury to another's rights be the consequence, the law will, if necessary, supply the intention. But I conceive that express intention may make that act in some cases unlawful in the beginning; so that where the injury intended follows, a right of action accrues, when, if there had been no such intention, it might be doubtful whether the party would have any ground of action. The noxious trade, the noisy occupation, or the erection of the building, considered abstractedly from the rights of others, is perfectly innocent; but if another has an existing right, and is in consequence injured by it, or prevented from the reasonable enjoyment of such right, he sustains an injury, for which an action may be maintained. I conceive that every person is protected by this rule, who has a right equal to that of him who does the act, and *who is injured, without his default, in the exercise of that right. In the case of the nuisances which I have particularized, the intention to do the injury is not an essential ingredient in the action. The act, and the injury to the right, are the essential ingredients. In cases where intention is necessary, the law will supply it. In *Parkhurst v. Forster*,† which was an action against the defendant, a constable, for illegally billeting a dragoon on the plaintiff, and forcing the plaintiff to find meat, drink, and lodging for him, the special verdict found, that the plaintiff kept a house at Epsom for those who came there for the air, and to drink the waters there, and sold small beer to his lodgers, and that the defendant had billeted a dragoon, and that the dragoon forced the plaintiff to find the meat, &c. It was objected for the defendant, that there was a variance between the fact in the

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† 1 Lord Raym. 430.

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verdict, and in the declaration. Lord HOLT said, At common law, if a man does an unlawful act, he shall be answerable for the consequences of it, especially where, as in this case, the act was done with intent that consequential damage should ensue. There are cases, however, where intention is essential in fact :— an instance of which is of modern date. *Jefferies v. Duncombe*.† In this case the defendant had erected and placed a lamp in the front of and near adjoining to the plaintiff's house, and kept it lighted there in the day-time, meaning thereby to mark out the plaintiff's house as a house of ill fame. It was objected at Nisi Prius that this was not actionable. It was holden by Lord ELLENBOROUGH to be so, and the Court afterwards sustained the action. Here, the act by itself would not have been unlawful, as against any individual, but the intent of doing so to the injury of the plaintiff, made it so. In the present case, the fixing and screwing* the spears are not the cause of action : but the doing it with intent to wound and destroy all dogs which should come on the defendant's land in pursuit of hares there, and thereby destroying the plaintiff's dog in the manner stated in the special verdict. He has done that which was calculated to kill and destroy every dog which followed a hare from other lands in the defendant's woodland, as well as dogs which should come immediately into his woodland for the purpose of finding and pursuing hares there. I am of opinion that was calculated in general, and more particularly so as against Mr. Townsend, and the plaintiff, who must, I think, be deemed to be his representative.

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In pursuing this subject, it is fit to consider what the respective rights of the defendant and Mr. Townsend were. Each had the same species of property in his respective woodland. Each might use his land for taking game found therein for food, or might pursue it for pleasure. Each might have separated and divided his land from the other by impassable bounds. But they elect to occupy their respective property, divided only by a bank or mound of earth and a shallow ditch, not being a sufficient fence to prevent dogs from passing from the one to the other. The defendant says, that merely in

† 11 East, 226.

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respect of his possession, he may, for preserving that property which he has *ratione soli*, place these instruments in his lands for the destruction of all dogs coming there in pursuit of hares. If so, it must be admitted that Mr. Townsend may do the same. If this was done on both sides, this would render the property to be preserved by these means of no use; for neither could enjoy it without the certain destruction of the dogs used as the means of enjoyment. I cannot conceive that this can be a rational or legal use of property. I think neither of them can do this; for he who on either side *pursued the hares from the one woodland to the other woodland, would be a mere trespasser by the entry of himself and dog, or of his dog only, if encouraged to go there by him; for which injuries the law has provided, as I have before suggested, ample remedies. The case of a person having land adjoining the land of another, and putting cattle on his land, which wander into the other's land, was mentioned at the Bar, in order to shew that a trespass would be thereby committed; of which no one could ever doubt, because there it is the duty of the owner of the cattle to watch and guard them. It is possible to do this, and therefore he must do it: and not having done this, he is a trespasser. I do not see how this advances the defendant's case. The case of persons having common by reason of vicinage is much more like the present. There each of the owners of the respective common or waste may enclose, but neither does; and the persons having right of common on the respective commons or wastes turn thereon their cattle: these cattle wander from the one common to the other; yet no action of trespass lies: Why? Because it is matter of mutual convenience; and to require the commoners on either side to watch their cattle and keep them on their respective commons, would be to require a thing to be performed which man is incapable of doing. How are the defendant and Mr. Townsend situated? The defendant *ratione soli* of his woodland, and Mr. Townsend *ratione soli* of his woodland, had a species of property in the hares on their soil. This appears to be the settled doctrine, from the case of *Sutton v. Moody*,† and *Churchward v. Studdy*.‡

† 1 Lord Raym. 250. S. C. Com. 34. ‡ 12 R. R. 513 (14 East, 249).

It is fit to mention here, that in the hare which was started by the plaintiff on Mr. Townsend's land, had it been killed by the dog, the property would have *been vested in the plaintiff, or in Mr. Townsend. This is manifest from the authorities I have referred to. It is now contended by the defendant, that one having this species of property, may do for the preservation of it acts which he cannot legally do for the prevention of trespasses on his soil, by reason whereof he has this qualified transient property. I am of opinion, that neither for the purpose of preserving game, or for the prevention of ordinary trespasses, can the occupier of the soil lawfully place engines or machines for the purpose of preserving or protecting such property, with intent thereby to kill or wound the dog used by its owner who uses it on the land, or to do personal injury to the owner himself. But the plaintiff was not even a trespasser, nor was he in default. It is a well known principle of the common law, that it does not require of any man to do impossibilities. In the present case, it cannot be urged that the plaintiff was not lawfully on Mr. Townsend's land, in lawful exercise of Mr. Townsend's rights, by his licence, and with his authority. If the plaintiff has done wrong to the defendant, or was guilty of any default, when did either of these things commence? Was it when he entered Mr. Townsend's land? Was it when he was sporting there? Neither of these things can be urged. Was it when the hare was started, and was pursuing its own course towards the defendant's land, before the dog pursued it? That cannot be said; for over the hare the plaintiff had no control. Was it when the dog pursued her? No; for the verdict says, that the plaintiff endeavoured, as much as in him lay, to prevent his dog from pursuing the hare into the defendant's woodland, but was unable so to do. Yet it is urged at the Bar, that notwithstanding the situation of the properties of these gentlemen, notwithstanding the plaintiff's exercise of a lawful right under Mr. Townsend, *notwithstanding his utmost endeavour to prevent his dog going into the defendant's woodland, notwithstanding he is neither a trespasser or a defaulter, he is to have no satisfaction for the loss of his property, destroyed by the acts of the defendant, calculated and effectually planned to destroy all dogs that

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should come into his woodland in pursuit of hares ; and this, too, a case, where the dog pursued a hare in which the defendant had no interest *ratione soli* at the time. Here I think it proper to take notice of the case of *Blithe v. Topham*,† cited for the purpose of shewing that it was the default of the plaintiff. The declaration stated, that the plaintiff dug a pit in his common, by means whereof the plaintiff's mare, being straying, fell into it, and perished. This was held to be naught, for when the mare was straying, and plaintiff shews not any right why it should be there, the digging of the pit was lawful as against him. I answer to this, that for any thing that appears to the contrary, first, the digging this pit was lawful as against every body. It might have been a gravel-pit or chalk-pit dug in the ordinary use of the soil. 2ndly, There is no intention to produce damage to any one stated or suggested in that case. 3rdly, The default was wholly in the plaintiff, in permitting his mare to stray. If this had been held to be actionable, a man could not use his own land, he could not procure chalk, &c. for the manure of his land, without peril of being ruined by the neglect of others. How can this case be assimilated to the defendant's case, who intentionally places the sharp instruments to produce the mischief he has effected, and without any statement on the record that this was a means necessary for the preservation of his hares, and without which they could not be preserved? For these *reasons I say, that the acts of the defendant stated in the special verdict were unlawful, and that the plaintiff having sustained an injury thereby, without any default in him, is entitled to maintain this action.

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My second proposition is, that if the plaintiff had been a trespasser, or otherwise in default, by the entry of his dog into the defendant's premises as stated in the special verdict, the defendant could not in any manner have justified the direct killing of the dog. This proposition scarcely requires any authority ; common sense is against such an act. Every lawyer knows, that the law has provided ample remedies for such injuries : a remedy *in rem*, where the thing doing the damage can be taken, and this secures a satisfaction ; but in that case

† Cro. Jac. 158.

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the party distreining cannot kill, injure, or otherwise use the distress, than for its preservation, as milking a cow. It has also provided a remedy *in personam*, by action, where the thing doing the injury for any cause cannot be distreined. But there are authorities on this head which are most important. I consider the case of *Beckwith v. Shordike* and another,† as a strong authority to this effect, notwithstanding the result of the peculiar case. That was an action of trespass for entering the plaintiff's close with guns and dogs, and killing his deer. The defendant pleaded not guilty: the jury found him guilty, and gave 30s. damages. A motion was made to set aside the verdict. The Judge who tried the cause was of opinion, that the jury ought not to have found the defendants guilty, it being an accident that happened without their intention, and against the inclination of the defendants. The Court said, that those cases must depend very much upon the particular circumstances appearing in evidence, whether the persons who owned the dog, which, in their company, *did the mischief, were or were not trespassers. The jury were to judge *quo animo* they entered the close. The Court said, that the Judge, though he might think otherwise, did not direct them which way to find their verdict, but left it to them. Lord MANSFIELD: The damages are so small, that it is not worth while to set aside the verdict on payment of costs. The play would not be worth the candle. This case supports my first proposition; but I did not mention it before, thinking it well introduces a case in which the doctrine laid down by the Court is in point on this head. I mean the case of *Vere v. Lord Cawdor and King*.‡ Trespass for shooting and killing the plaintiff's dog. The defendants pleaded the general issue. The defendant King pleaded specially, that Lord Cawdor was possessed of a close, part of his manor of Kidwelly, of which he was lord, and that the defendant King was gamekeeper of the manor, duly appointed to preserve the game upon the said manor; that the plaintiff's dog was in the close of the said Lord Cawdor, being part of his said manor, running after, chasing, and hunting hares there, and that the defendant King, being gamekeeper, for the preservation of the said hares, shot

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† 4 Burr. 2092.

‡ 11 R. R. 268 (11 East, 568).

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and killed the dog. To this plea there was a demurrer. Here was no attempt to put on the record a plea of a justification in respect of the possession. But the case is put on a much more rational ground, a justification under the game laws. The language of Lord ELLENBOROUGH applies most forcibly to the proposition I am now maintaining. His Lordship says, "The question is, whether the plaintiff's dog incurred the penalty of death for running after a hare in another's ground? And if there be any precedent of that sort, which outrages all reason and sense, it is of no authority to govern other cases. There is no question here as to *the right of the game. The gamekeeper had no right to kill the plaintiff's dog for following it. The plea does not even state, that the hare was put in peril, so as to induce any necessity for killing the dog in order to save the hare." Here the defendant was clothed with all the exclusive powers vested in him as gamekeeper, under the system of laws commonly called the game-laws: and yet the action was maintained by the Court of King's Bench against him, and his plea was held to be bad. Suppose, in this case, the defendant had shot the plaintiff's dog: what defence could the defendant have put on the record? His plea could only have been, that he was possessed of a close called the Woodlands, in which there were hares; that the plaintiff's dog followed a hare from Mr. Townsend's close, and he the defendant, to preserve that hare, shot the dog. This is the case on the record: on demurrer, such a plea must have been held to be bad.

The third and last proposition I have to state, is, that the defendant cannot justify killing the dog indirectly, if he could not have justified the doing it directly. In support of this proposition, I need only resort to the storehouse of wisdom, the common law of England. There I find it written in plain terms, that *Quando aliquid prohibetur ex directo, prohibetur et per obliquum.*† The law, I contend, forbids the killing of the dog directly, for a mere trespass. The defendant is not justified in doing that by indirect means, which he could not lawfully do by direct means. Other cases were cited at the Bar, besides those I have mentioned. I have read and considered them, but have

† Wingate, 680.

particularly referred only to such as, in my judgment, bear materially on the question before the Court.

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If I still find that the Court is divided on the question, thinking it, as I do, a matter of great importance *to the public, and to be a case that ought to be decided the one way or the other, I shall decline giving my judgment on this occasion, that the party may have the judgment of this Court reconsidered in another.

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I add this for the good of all who hear me ; I counsel them to abstain from acts of this kind ; and though these acts are usually done for the preservation of the game, I recommend to them to consult their lawyers, and trace all similar acts to their consequences as they may affect the life of man, before they venture to repeat them.

PARK, J. :

The facts of this case, as alleged in the first count of the declaration, and as found by the jury, have been so fully stated by my brother BURROUGH, that I need not repeat the former part ; but the material facts, as found by the special verdict, when stripped of all technical language, are these, that a large tract of woodland belonging to the defendant adjoined upon a piece of woodland belonging to a gentleman of the name of Townsend, separated only by a low bank or mound of earth and a shallow ditch, but not being a sufficient fence to prevent dogs from passing from the one woodland to the other : that through the defendant's woodland there were public footpaths, not fenced off from the rest of the land : that the defendant, for the preservation of hares in his woodland, and to prevent them from being killed by dogs and foxes, did, for the purpose of wounding and killing dogs and foxes that might come into his woodland in pursuit of hares, cause several iron spikes called dog-spears, to be screwed and fastened into several of the trees in the woodland, and did also, for the same purpose, keep those spears fastened over the hare-paths, and they were purposely placed at such a height, as to allow a hare to pass under them without *injury, but to wound and kill a dog that might happen to come against one of the sharp ends, and the spikes being adapted to effect the

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said purpose: that none of the spikes were at a less distance than fifty yards from the public footpath; others at much greater; namely 150 or 160 yards: that the defendant had caused notices to be painted on boards at the outside of his premises, "Take notice that steel traps and spring guns, and dog-spikes are set in these woods and premises:" that the plaintiff, by the consent and permission of Mr. Townsend, went into the woodland belonging to Mr. Townsend, for the purpose of sporting, accompanied by a pointer dog: that a hare rose in Mr. Townsend's grounds, and was seen and pursued by the plaintiff's dog: that the hare ran, and was pursued by the dog over the mound, into the defendant's woodland, and ran against one of the sharp ends of the spikes, and was thereby killed: that the plaintiff endeavoured, as much as in him lay, to prevent the dog from pursuing the hare into the defendant's woodland, but was unable to do so. These are the facts, and the question is, whether the plaintiff can, under these circumstances, maintain an action on the case for the value of his dog. I am of opinion that he may; and knowing from what ability and authority I differ, I cannot but deliver that opinion with great diffidence, though I honestly entertain it after the most mature deliberation and consideration of all the cases. Some things are clear: no trespass has been committed in this case. The act of the dog was not a trespass. No action of trespass would lie against the owner, unless he had incited the dog: the contrary was the case, for it expressly appears that he was lawfully using his dog, under the authority of the owner of the ground where he was sporting; and, when the dog escaped, instantly endeavoured to restrain and call him back. The distinction *between voluntary and involuntary acts, which constitute a trespass in the one case, and not in the other, is well taken in *Millen v. Fawdrye* (best reported in *Popham*), and *Beckwith v. Shordike* and another. But it was said at the Bar, this dog was an intruder, and was there without licence. I do not know what intrusion is, as applied to this subject-matter. At all events it cannot be a stronger act than a trespass; I have shewn that this was not a trespass, and I shall presently endeavour to shew, that even if it were a trespass, the defendant would not have been

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warranted, under the circumstances, in doing what he did ; *a fortiori*, if it was an involuntary act, and one which the plaintiff did all in his power to prevent. Another point I take to be clear, that if an actual trespass had been committed by horses, sheep, or other cattle which the owner is bound so to keep as to prevent them from trespassing, the owner of the ground could not have killed the animal directly, unless it became necessary to do so, in order to prevent the actual destruction of some of his own property. Such a direct act of killing would have been an act of trespass. For this the case of *Vere v. Lord Cawdor* is an express authority, and the opinion of Lord ELLENBOROUGH is so strong to this case, that I must occupy some little time in stating it. Here the learned Judge fully stated that case, *ut supra*. That was an action of trespass, because the killing was direct. Here the fixing of the spikes in the defendant's own ground could of itself not be a trespass, but it is the consequence of the act of which the plaintiff complains ; and when the defendant fixed the spikes, he must be considered as having contemplated the probable consequences of his own acts. Indeed, this special verdict does not leave any doubt on this point ; for it is found, that these spikes were placed there for the purpose of wounding and killing dogs. I assume it as another clear proposition, *that under the circumstances the hare in question was not the property of the defendant, and therefore it was not necessary to kill this dog for the protection of the defendant's property : for it was admitted at the Bar, that if the hare had been killed in the defendant's ground, it would not have been his. Indeed this has been decided in many cases : in *Sutton v. Moody* : " If A. starts a hare in the ground of B., and hunts it into the ground of C., and kills it there, the property is in A. the hunter." This is stated as text law in Blackstone's Commentaries,† and finally confirmed in *Churchward v. Studdy*. It must be admitted, then, upon these authorities, that as there was no voluntary trespass, as there was no property of the defendant's own to protect, neither the defendant, nor his servant, could have stood there with a gun, and shot this dog in pursuit of the hare. Why ? because it is said at the Bar, a man ought to exercise a discretion.

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† 2 Bl. Com. 419.

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I have ever thought it quite clear, that no man shall do that indirectly, which he cannot do directly. The placing these dog-spears for the express purpose of killing, is, as it appears to me, just the same as if the defendant had placed a man there for the purpose of shooting. Nay, it is worse; for in the one case a man would exercise a discretion; but here, death must inevitably ensue without any discretion being possible to be exercised, without any regard to circumstances, and without giving the opportunity of knowing what the circumstances might require. If then an actual trespass on the ground would not justify the destruction of this animal, without some apparent necessity to preserve the defendant's own property from destruction, how can it be justified by that which was not a trespass, nor even the subject of an action on the case? The dog cannot be said to be an intruder, for *the defendant had taken no means to prevent dogs from coming into his land; for it is expressly found by the verdict, that the mound and ditch were not a sufficient fence to prevent dogs from passing from the one woodland into the other; and Mr. Justice DODDRIE, in the case in Popham, mentions there being no fence as a circumstance worthy of observation. Indeed, from the placing these spears, as it is found, for the purpose of destroying dogs, it is evident they were expected to come, and, knowing the roving disposition of a dog, which, as some of the cases state, cannot be ruled suddenly, the law has provided, that the act of the dog shall not make the owner a trespasser, unless he has incited the dog to do the particular act. Even an action on the case will not lie against the owner for a mischief committed by a dog, unless it be alleged that the dog had the vicious propensity to bite, or to the sort of act complained of, and also the owner's knowledge of the animal having that propensity. But here the animal only followed his natural bent; and it must ever be remembered in this argument, that the hare did not belong to the defendant. A case from Cro. Jac. of *Blithe v. Topham* has been much pressed by my brother *Bosanquet*. The same case is mentioned in Roll.† If A., seised of a waste adjoining to a highway, dig a pit in the waste, within 36 feet of the highway, and the mare of B. escapes into the

† 1 Ro. Abr. 88.

waste, and falls into the pit, and dies there, yet B. shall not have an action against A.; for his making the pit in the waste, and not in the highway, was not any wrong to B., but it was the fault of B. himself that his mare escaped into the waste. It is sufficient to observe that two most material facts are found in the present case, which are not existing in the case in Roll. and Cro. Jac., namely, that B. is there *stated to be himself the faulty person, in suffering his mare to escape. Here, on the contrary, it is found, that the plaintiff endeavoured, as much as in him lay, to prevent his dog from going on the defendant's land, but in vain. A man may, and easily can, control his horse, but he cannot control his dog. All the cases in the law which oppose such an action in the plaintiff, go upon the ground, that he has not used ordinary caution. But the case in Roll. differs from this at the Bar in another most material respect, viz. that it is not found that the pit was dug for the purpose of killing mares. If it had, and had been decided for the defendant, I then should have thought it a strong authority; but, as it stands, I do not feel the weight of it. A case of *Brock v. Copeland* was also quoted, for an opinion of Lord KENYON; but it is to be observed, that the decision of the learned Chief Justice turned expressly upon this, that the defendant had properly let loose the dog, and the injury had arisen from the plaintiff's own fault, in going incautiously into the defendant's yard, after it had been shut up. But the latter part of what Lord KENYON states, with regard to what had happened before him and the whole Court in another case, shews to my mind most manifestly, that had his Lordship had a similar case to this before him, he would have been clear for the plaintiff. In an action against a man for keeping a mischievous bull, that had hurt the plaintiff, it having appeared in evidence, that the plaintiff was crossing a field of the defendant's where the bull was kept, and where he had received the injury, the defendant's counsel contended, that the plaintiff, having gone there of his own head, and having received that injury from his own fault, the action would not lie: but it appearing also in evidence, that there was a contest concerning a right of way over this field wherein the bull was kept, and that the defendant had permitted *several persons to go over it, as an

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open way, Lord KENYON, Ch. J., had ruled in that case, and the Court of King's Bench had concurred in opinion with him, that the plaintiff having gone into the field supposing that he had a right to go there, and the defendant having permitted persons to go there, as over a legal way, he should not then be allowed to set up in his defence the right of keeping such an animal there, as in his own close ; but that the action was maintainable. The case of *Butterfield v. Forrester* seems to me to be an authority for the doctrine I am maintaining. It was an action on the case. A man repairing his house at the end of a town, had put up a pole across this part of the road, a free passage being left by another branch or street in the same direction. This erection, therefore, was not put up to cause, but to prevent mischief. The plaintiff, riding unusually hard through the streets of Darby, did not see this obstruction (though he might have seen it a hundred yards off), rode against it, fell with his horse, and was much hurt. The jury found for the defendant, and the Court confirmed the finding; Lord ELLENBOROUGH saying, amongst other observations, that two things must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff. Here those two things do concur, the wilful erection of these spears by the defendant, for an unlawful purpose, viz. to kill dogs, and no want of ordinary care in the plaintiff, for he did all he could to control his dog, but in vain. If the defendant is warranted in putting these spikes where he did, he might equally have done so, if his wood had run along the high road, and no mound or fence between but such as that in question; for the distance can make no difference. The sort of protection, therefore, which the defendant has resorted to for the *prevention of that, which, at the most, is a trespass, might have been fatal to human life; and when we are weighing whether a thing can be done, or not, all the consequences of such an action must be looked to. If upon this special verdict it had been found, that there was fault or blame in the plaintiff, the case might have been different, and this notion of fault in the plaintiff, I have shewn to be a considerable feature to guide the decision of the cause; and my brother *Bosanquet*, feeling the importance of

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such a fact, wished to make out negligence or misconduct in the plaintiff; but I did not hear him state one fact to that end; he said the plaintiff had notice, and therefore it was his own fault. It is true, he was aware of the notice, and so far from being in fault, he does all he can to comply with it; for, having a right to be where he was, and his dog having raised the hare, and pursuing her, the plaintiff “endeavoured, as much as in him lay, to prevent the dog from pursuing the hare, but was unable to do so.” What could the plaintiff do more, except never going out of his house, into his own, or his friend’s, ground, with his dog? But the defendant might have done more; for if he chose to put up these spikes, he ought to make the approach to his land more inaccessible, by putting up fences where so much inevitable danger lurked. Here then is a temporal loss or damage sustained by the plaintiff, as the immediate and contemplated consequence of the act of the defendant. It may be true that a similar action, in *speciè*, is not to be found in any law book; and I admit, that if the case were new in principle, it would be necessary to apply to the Legislature, and not to a court of law: but where the case is one new in the instance, and the question is upon the application of a principle recognized in the law to such new case, it will be just as competent to courts of justice to apply the principle to a case which may arise *two centuries hence, as it was two centuries ago. This is the very nature of an action on the case. Here is a temporal loss or damage sustained by the plaintiff (who has done no wrong, and who used every degree of caution and exertion to avert it), by the tortious act of the defendant, who must take the consequence, if his neighbour thereby sustain an injury. The two things here concur, which Lord ELLENBOROUGH requires, to support such an action; fault in the defendant, and no want of ordinary care to avoid it on the part of the plaintiff. For these reasons, I am of opinion that the plaintiff is entitled to recover.

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DALLAS, J. :

It has been admitted at the Bar, that this case is, in point of circumstances, altogether new, and therefore the argument

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has properly proceeded on general principles, and analogies, real or supposed.

The question is, whether, under the facts found by this special verdict, the defendant had a right to place the dog-spears in the manner, and for the purposes, for which they are found to have been placed, whereby, and as a consequence to be foreseen, the dog of the plaintiff has been killed, and for the loss of which the action has been brought.

And first, with respect to the alleged inhumanity of the proceeding, which has been adverted to at the Bar, and may weigh with many persons on the first view of the subject. It is not disputed that in some cases a dog may be killed for the preservation of a hare. In that cited at the Bar, of a dog found in a warren, this was expressly decided; yet, in point of humanity, where is the difference between destroying a dog in a warren, or in a cover for the preservation of game? It will be no answer to say, that a warren is a privileged place; for whether privileged or not, or whether game be property in one place, and not in another, though this may furnish a distinction applicable to the case, in other respects, it can make no difference on the present view of it.

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With respect to the particular mode of destruction, though this may be of fit moral consideration, it can scarcely be contended, that the law will distinguish, permitting a dog to be destroyed in one way, and yet forbidding it in another. The question is upon the right to destroy, and not upon the mode of destruction, as to which, subject to be judged of by others, every man must judge for himself. It has also been stated, that nothing appearing to the contrary, it is to be presumed the plaintiff was qualified. To this I cannot agree, for if the fact were material, it should have been found one way or another, but, in my view of the subject, it is of no consequence; for, if qualified, he could have no right to trespass on the defendant's grounds, and if unqualified, the defendant could have no right beyond seizing the dog, supposing he had by himself or his servant been present at the time. As little can depend on the circumstance that the plaintiff was sporting with the permission of the owner of the land on which the hare was started; for this could only be a licence as to the

land of such owner, and could give no right to go upon neighbouring land belonging to a different person. Nor can the distinction between wilful and involuntary trespass make any difference in this respect; for the question has been argued on ground applicable to the one as well as to the other, viz. that whether the trespass be voluntary, or involuntary, the party thereby injured had no right to act as the defendant had done.

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It has farther been stated, that there were different paths going through this wood; but this, also, appears to me to make no difference; for as to the plaintiff, he was not in the exercise of any right of way, much less *within the limits of such way; but, on the contrary, professing to have been involuntarily on the land in question; and if this had been the case of a person exercising a right of way, it is found that not one of these dog-spears was placed at a less distance than fifty yards from any path, and most of them at the distance of one hundred and fifty, so that if the injury had occurred in the exercise of any such right, the case would depend on very different considerations. In effect, according to the range the argument has taken, nothing will turn on whether it be a close or preserve with a right of way through it, or not; for in the one case, as in the other, it has been contended it would be illegal to place instruments of this description.

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Nor do I think it requisite, in this case, to consider how far, and under what circumstances, game is to be treated as property, and to what effect; for here, again, the argument in support of the plaintiff's case, does not depend on this distinction; but it is maintained, that even though for the preservation of that which is admitted to be property, as herbage, underwood, fruits of the surface, soil itself, or whatever as property will form the subject of trespass, still, what has been done in this case was unlawfully done, and the plaintiff is entitled to recover.

One other point only remains, before I come to the question itself; which is, how far the present decision will apply to measures that may by direct operation, or necessary consequence, affect human life. As to this, I will only observe, such cases seem to me to depend on different ground; the law distinguish-

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ing, to many, and most essential purposes, between property and the life of man; and to the facts of this case only, my present opinion is intended to apply.

[*519] I shall now, shortly, advert to the cases cited. And the first class goes to distinguish between voluntary and *involuntary trespass; as in the instance of cattle passing along the road, and consuming grass and corn, or the dog chasing sheep, and other cases of the same description, the owner doing all in his power to prevent it. To the doctrine and to the authority of all such cases, I fully subscribe; and if this action had been trespass against the present plaintiff, by the present defendant, the former might have defended himself on the facts found by this special verdict, but whether an action of a description precisely opposite, that is, an action brought against the owner of land for a damage sustained by a party having no right to be there, for an use made of the land by the owner, and being therefore there only under circumstances to make it excusable trespass, such damage being induced altogether by his own act, whether voluntary or not, whether such action will lie, is a question altogether different. Suppose, the trespass being voluntary, an action would lie, it will scarcely be contended that being involuntary, though this might excuse the party, it would give him a right of action against the owner of the soil for a damage, though resulting from an involuntary act. The case would have been in point, if the dog chasing the sheep or hare had been injured in such chase, and for the mischief incurred, an action had been brought; but no such case has been cited; and it must be admitted, that this action is a perfect novelty, though, with more or less of extent, this and similar practices have long and notoriously prevailed. To the next class of decisions I also equally accede; namely, those which establish, that you shall do no more than the necessity of the case requires, when the excess may be in any way injurious to another; a principle which pervades every part of the law of England, criminal as well as civil, and indeed belongs to all law that is founded on reason and natural equity.

[*520] It *would be superfluous to advert to particular instances. Admitting therefore the authority of these cases, but denying their application, it will not be necessary to follow them in detail,

and I shall come at once to the ground on which it seems to me they are to be distinguished from the present.

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And it is this; they all turn on the fact of presence. Such was the case in which the defendant pleaded that he killed the plaintiff's dog to preserve his own; the plea was held bad, because it did not allege that his own dog could not be otherwise saved; and so in *Vere v. Lord Cawdor*, because it was not averred that it was necessary to kill the dog for the preservation of the hare. So, in the case of nets, they might have been detained without being destroyed; or, as it was properly put in the argument at the Bar, where the owner of the property is present, and has the means of prevention in his own hand, he is bound to exercise his judgment, and not to do more than is immediately necessary; but it does not follow from this, that he may not take measures for the general preservation of his rights during his absence, the nature of which must depend upon considerations altogether different. All such cases are, for these reasons, to be distinguished, as it seems to me, from the present. It is contended, however, that they apply; and, if you may not kill a dog by your own immediate act, or order, neither can you by means provided to induce such consequence, when not personally present; for what, it is asked, is the difference between killing with your own hand, with an instrument placed therein at the time, or by an instrument placed by that hand on the ground, for the future purpose? That which it is unlawful to do by direct means, it is equally unlawful to do by indirect means; and to this point the case of *Vere v. Lord Cawdor* is cited.

But here, again, it appears to me, there is a misapplication of principle.

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Is it illegal to place spikes or glass upon a wall? and if a party climbing over be thereby wounded or cut, can he bring an action? And yet, if I were to see a trespasser coming down my area, or getting over the garden wall, I could not drive the spike into his hand, or cut him with the glass. Or, (to bring it home to the present case,) suppose that, in order to separate his property from that of his neighbours, the defendant had erected a wall, and put spikes or glass upon it, and that the plaintiff had been wounded in attempting to get over, could this action have been

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maintained? If not, where is the distinction between spikes on the ground, with notice that they are there, or notice given by the visibility of the spikes themselves? With respect to the owner of the dog, certainly none, and for the conduct of the dog the owner is responsible, if not to the extent of giving an action against himself in a case where all is done that could be done to restrain the dog, yet, at least to exempt the owner of the soil from an action for an injury done to the dog. But, if the owner had taken his station on the wall, he could not in person have made use of the glass or spikes. The doctrine depends on a broad distinction. Presence, in its very nature, is more or less protection; absence is abandonment and dereliction for the time; presence may supply means, and limit what it supplies; but if, during absence, property can only be protected by such means as may be resorted to in the case of presence, all property lying open to inroad can have no protection, at least by any act of the party himself; for to say that he can only be protected when absent, by such means as he could use if present, is a contradiction in the nature of things.

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But, it is further said, you shall make such use of your own property as not to injure that of another; and to this also I agree, in the true sense of the maxim, which is, the right of another, for, if, in breach of this rule, my right be invaded by another, what is done by me, if only adequate to repel such invasion, is not an infringement of his right, but a defence of my own, and must turn on the consideration of what, to defend such rights, I am permitted by law to do.

On this foundation stands the whole law of actions on the case for consequential damages, and the doctrine of nuisance, as it may affect individuals or the public, in all its variation of form. The difference is, between absolute and relative rights, between that which is mine, exclusive of any right in others, present or future, and that which is of a spreading, shifting possession, as air, water, &c., in which I have but a qualified possession, a possession subservient to the future use by others. If I place a log across a public path, and injury be thereby sustained, the soil being my own, but the public, or individuals having a right of way over it, an action will lie, because there is

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a right in others to pass along without interruption ; but if there be no right of way, I may with any view, and for any purpose, place logs on my own land, and a party having no right to be there, and sustaining damage by his own trespass, cannot bring an action for the damage so sustained. So, in the case put of a ditch, I may not dig it, so as to interfere with any public or private right, but within the limit of my own property adjoining a common, and not separated from it by any actual fence, I may dig a ditch, however wide ; and man or beast sustaining harm, having no right to be there, no action will lie. Such was the case cited of the horse straying from the common, and falling into the pit, and in which it was determined that no action would lie, first, because the owner had a right to do what he pleased with his own land, and next, that *the plaintiff could shew no right for the horse to be there ; and yet, that a horse might, in the night or day, stray from an open common into adjoining land, not separated by any fence, was, as a probable consequence, as much to be foreseen, as that a hare might spring up, and a dog chase ; or, if the horse had escaped from the owner, and he had sustained damage in the pursuit, would that have given him a right to damages for the consequence of an escape, which he ought, in strictness, to have prevented ? I may not keep a mischievous bull in a field through which there is a right of way ; but when there is no right of way, I am entitled so to do, as was stated by Lord KENYON in one of the cases cited at the Bar, and this, by way of illustration, for the very purpose of shewing the distinction in question. The only case cited on this part of the subject, as bearing the other way, is that of *Townsend v. Wathen* ; but in facts and circumstances it has no resemblance to the present. The object in the former was to attract, in order to destroy the dog ; and in this, the immediate purpose was to keep the dog from a situation, in which he might incur destruction. In *Townsend v. Wathen* the enticement was made to operate beyond the line of the defendant's property, and to the destruction of the dog, where the dog had a right to be ; and this enticement constituted the foundation of the action. It is, in effect, but the common case of nuisance.

But no decision has established, that a trap placed by a man

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in his own land, and not calculated to operate so as to allure, beyond, or even within the limit of such land, would be a trap unlawfully placed. But it has been argued that the principle of the case, at least, applies in this way, that though the enticement be not the direct act of the party, yet it arises, of necessity, from the act done ; as, for instance, that a hare lying near the hedge of a highway forming one side of a woodland *in which spears are put, may operate to entice a dog passing along the highway, and this I admit may happen. But if the owner of land have a right to game upon his land, and a right which he undoubtedly has, to a certain degree, whether a hare shall lie in one place or another, is that, which, generally speaking, he can neither cause or control, and being incident to the common and ordinary enjoyment of land, is that to which others must submit, incurring only the duty of restraining their dogs, which, in numberless instances, I conceive, they are bound to do. But take it the other way ; if a wilful trespasser, and to this the argument goes, may bring an action for loss or damage sustained by his own trespass, he may beat the cover of every man of landed property in the neighbourhood, and bring an action for his dog, if killed or maimed, in the way, at least, in which this case has been argued. Nor will it be any answer to say, that an action of trespass might be brought against him ; for though the event of each action might be different as to damages, still in point of principle it leaves the objection the same. But here, again, I must ask, where is the line to be drawn ? Suppose dog-spears planted at a distance from any road, in a preserve, surrounded on all sides by land belonging to the owner, and to an extent to render attractions or enticements impossible by the game lying in such preserve, will it be said that in such a case an action would lie ? The argument, not indeed in words, but, unless I mistake it, in effect, goes to this extent. You may traverse field after field, add trespass to trespass, for the purpose of getting to insulated and protected property, turn in your dog, follow it yourself, and if one or the other be hurt, bring an action against the owner for the damage sustained. The argument, I say, proceeds to this extent ; for though in this case the dog was

[*525] *endeavoured to be restrained, yet the doctrine goes to the

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general illegality of placing such spikes under any circumstances; nor has it been limited by the distinction between voluntary and involuntary trespass. With the greatest possible respect for the different opinions entertained, to this I cannot agree.

I have likewise attended to the argument, but in vain, to learn where, in cases of this description, the doctrine is to stop. Is it meant to be laid down, that no trap may be placed for the destruction of vermin of any description? for in every such trap, a dog may be maimed, if not killed; and if so, how does such a case differ from the present? If the owner may bring an action for one sort of injury, the consequence of trespass on his part, why not for another? if for killing by a dog-spear, why not for maiming with a trap? The cases differ, not in kind, but in degree, and, on the ground taken in the argument, I do not see why every trap, for whatever purpose set, by which a dog may be killed or maimed, will not subject the owner of the land to an action; and traps are equally set against vermin, for the preservation of game, as appears, indeed, from the facts found by the present verdict.

Finding, then, no case in which any such action has ever been brought, nor any instance of an indictment for a nuisance, which this would be, if the argument for the plaintiff be well founded in its extent, nor any precedent of such an indictment in any book, though the practice, in various forms, is of extensive prevalence; thinking, too, that every analogy resorted to has failed, and that all principle is the other way, I am of opinion, on the general ground, that this action cannot be maintained, and I have been anxious to deliver my sentiments fully on this point, that I may not be thought to have declined it; though I think, at the *same time, there is a narrower ground which would be of itself sufficient in favour of the defendant.

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It is found by the special verdict that these spears were placed for the destruction of foxes, as well as dogs; the purpose, in both cases, being the preservation of hares. I have not heard it argued, that to destroy a fox is illegal, or that the argument of not shooting the dog, unless to preserve the hare, will apply to the case of a fox. A fox may be undoubtedly destroyed. In

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hares, every owner of land has a qualified property for the time being, in respect of their being on his land. In this all the cases agree. To preserve it by lawful means is a lawful purpose. Suppose, therefore, the special verdict had found that the spears had been placed for the destruction of foxes only, in order to save hares; would this become unlawful, because, by possibility, and against the original intent, the death of a dog had been induced? or is it to depend upon intent? If so, a man has only to place such instruments and give no notice, and there will be no proof of intent; but it seems strange to say, that by giving notice he places himself in a worse situation, and this, though done by him in order to place others in a better, that is, in order to save their dogs, as a means, it is true, to save his own game. I have a right to kill a fox, and I intend to protect my game on my land by so doing; but because your dog may be killed, if found where he ought not to be, is my right therefore to cease? This seems to me extraordinary doctrine. Generally speaking, the party may justify by referring his act to any lawful cause, as in the case of *Crowther v. Ramsbottom* and others,† in which it was held, and on the authority of many former cases, that in trespass for breaking and entering the defendant's close, and taking his

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*goods, the defendant may justify under a sufficient legal process, if he had it in fact at the time, although he declared that he entered for another cause; and a case was cited by LAWRENCE, J., in which HOLT, Ch. J. said, suppose one has a legal and an illegal warrant, and arrests by virtue of the illegal warrant, yet he may justify by virtue of the legal one, for it is not what he declares, but the authority he has. In this case, the verdict finds that the spears were placed to kill foxes as well as dogs, which, taking it to be a lawful purpose, is one to which the original act, that is, placing the spears, may be referred. Being legal in one respect, can it become illegal by that which has been called in some case the turning up of the event? or, upon the doctrine of being taken to intend that which is a probable consequence, is a possible consequence to be inferred or intended in opposition to the primary and immediate intent, such intent being to avert the very consequence, as to which the particular

† 4 R. R. 540 (7 T. R. 654).

intent is inferred? Every man is liable for the consequences of an act illegal in itself, but for the consequences of a legal act, such as placing spears for one purpose must be admitted to be, because a consequence follows, which, if it had been the single end and object, (it may be taken, for the purpose of the argument in this stage of it,) would have made the act illegal, that under such circumstances an action will lie, is that for which I cannot feel any principle, or discover any authority. At any rate, these are anomalies which greatly increase the difficulty, even on the former view of the subject, and add to my embarrassment in deciding for the plaintiff.

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The argument of inconvenience has been slightly touched. It is of fair application in a new and doubtful case; and consequences have been predicted of injury to the public and individuals from a decision in favour of the defendant. Having already delivered my opinion *too much at length on the case at large, I will only say, I feel no such alarm myself. The past is, in this respect, the best security for the future. Practices of this kind, various in their form, but similar in their object, have, with notice to the public, long and extensively prevailed. Yet this is the first instance of an action having been brought. On the whole, I am of opinion that judgment ought to be for the defendant.

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I have reflected on this question repeatedly, and the respect due to my two learned brothers who first delivered their opinions, would incline me strongly to concur with them; but after the fullest consideration, I feel myself obliged to say, that I think this action cannot be maintained. No authority has been cited in support of it, no instance produced in which such an action has before been brought, nor have I heard any legal principle stated on which I think it can rest; and considering the case upon the general principles of law, I conceive, that as far, at least, as civil rights are concerned, every man may guard his own land by any means he pleases, provided he does not thereby invade or interfere with the legal rights of others. One mode of guard is the setting up such defences as will render it dangerous

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for the animals of others to pass over our land, and if, after this, they endeavour to pass without right, it is at the peril of their masters, who do not keep them within their own bounds. What the defendant has done, was on his own land, and could not molest any other man in the exercise of any legal right. I cannot think that he was bound to consider the degree of mischief which those guards, so set up on his own land, might occasion, either to beasts or dogs that wrongfully encroached upon him. The wrong is with those, whose dogs are permitted to wander into the defendant's land, and if they suffer by *such means as the defendant has used for excluding or stopping all such aggressors, the fault is their own. The defendant's act in laying the dog-spears was harmless until the plaintiff's dog wrongfully intruded upon him. The hurt which he received is, therefore, to be referred to his own wrongful intrusion, which was the immediate cause of it. If the dog had no right to be there, as he certainly had not, his owner cannot complain that he was injured by the defences set up against all dogs in general. If the dog had a right to be there, then I admit that this action is maintainable ; but, for the reasons which I have before given, and some which I shall have occasion to add in observing on one of the plaintiff's arguments, I conceive it to be clear that he had not. I have put this case altogether upon the rights of the defendant on his own land, without considering under what circumstances a man may acquire a title to game which he kills ; because, if he has not a legal right to enter my land in pursuit of the game, as in this case he certainly had not, such considerations do not touch the present question. I know it is a rule of law, that I must occupy my own so as to do no harm to others ; but it is their legal rights only, that I am bound not to disturb. Subject to this qualification, I may occupy or use my own as I please. It is the rights of others, and not their security against the consequences of wrongs, that I am bound to regard. Numberless instances might be stated, not in substance distinguishable from the present, in which men have uniformly acted upon this principle, without objection or question. I believe it never was doubted, that the owner of a several fishery, with the soil, might place hooks in the bed of the stream to

destroy the nets of persons endeavouring unlawfully to fish in it, or that the occupier of a field may fix bushes thereon, as a guard against those who shall attempt, without his *leave, to draw nets over it for game. The immediate object in both these cases, is not to destroy the nets, but to prevent all persons from invading their neighbour's property, by the danger of destruction to their own. If they do invade it, the nets will as certainly be destroyed there, as the dog is here, and in both cases the consequences must equally rest with the owner. In point of strict right, there is no distinction between a dog and a net; both are personal property, and secured to the owner by the same rules of law. We naturally lament in all cases where an innocent animal suffers; but let it be remembered, that it is the voluntary act of his master which exposes him to this danger; and in the present case, I may add, after caution given to avoid it. It should also be observed, that the verdict states these dog-spears to have been planted for the destruction of foxes as well as dogs, and they are calculated equally for the destruction of both in their passage through the land. Now it certainly was one of the defendant's rights to destroy foxes on his own land, by this, or any other instrument of annoyance, and it does seem most extraordinary, to say, that he shall be restrained in his right of destroying foxes by this sort of instrument, lest dogs, which may come wrongfully on his land, should suffer by the same means. If it is true, as the plaintiff must contend, that it was unlawful in me to set up these defences on my land, lest his dogs, pursuing game that way, should suffer by them, it follows that he must have a right to enter and remove them; for then they are an abateable nuisance. In other words, he may himself justify a trespass on my land, to secure a safe passage for his dogs in their subsequent aggressions thereon. I cannot persuade myself that this is the law. I come next to the authority of decided cases. The only one which touches the present question, is that of *Blithe v. Topham*, which, in my *opinion, is strong against the plaintiff; but, before I observe upon it, I will state shortly in what cases an action of this nature is confessedly supportable, and upon what ground alone it can stand. If I divert a water-course from my neighbour's land, or corrupt it in its passage through mine,

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or erect a new building which obstructs the lights of his dwelling-house, I am liable, as has been truly said, to an action at his suit; because he had a right to the water-course and to the lights, and I have disturbed him in the enjoyment of those rights; but let me suppose the water-course does not flow out of my land into his, but goes off another way; and that after I have rendered the water unwholesome, his cattle escape into my land, without right, and suffer by drinking the corrupted water there. There is no pretence for saying that he can maintain an action against me; because he had no right in the water, nor had his cattle any right to come upon my land where they drank it; and the hurt which they suffered is referable solely to their own wrongful aggression. So it is here; if the dog had a right to enter the defendant's land, the action would have been maintainable; but as he entered without right, the consequences rest with himself. If I dig a pit, or fix instruments of annoyance upon my land over which another has a right of common, or a right of way, or any other right, and his cattle, in the exercise of those rights, are thereby destroyed or damnified, he may unquestionably maintain an action against me for the injury which he suffers. But why? because in those cases his cattle had a right to be where they were, and received damage from my wrongful obstruction to the exercise of that right. Their right to be there is the gist of the action; and in no instance has such an action been supported, where the cattle had no right to be in the place in which they received the damage, unless the defendant *had used some undue means to entice them thither, as in *Townsend v. Wathen*,† which stands upon a distinct ground: See 1 Ro. Abr. 88, where the cases in which such action lies are collected together. Here the dog had no right to be where he was, and the defendant had a right to obstruct him; and, consequently, there is no pretence for supporting this case from analogy to any of those to which I have alluded. The case of *Blithe v. Topham* which I mentioned before, was an action upon the case, brought against the defendant, for digging pits on a common, whereby the plaintiff's mare, straying thereon, fell into one of them, and died. There was a verdict for the defendant, and the plaintiff, to save

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† 9 R. R. 553 (9 East, 277).

his costs, moved in arrest of judgment, that the action could not be supported, because it did not appear that the plaintiff's mare had any right to be on the common, and of that opinion was the whole Court, and it was adjudged that the bill should abate. An authority more directly in point against the plaintiff in the principle upon which it was decided, can hardly be stated. The defendant was there held not to be answerable for the damage done to the plaintiff's mare, because the mare had no right to be on the land where the pit, into which she fell, was dug; and, by the same rule, the present defendant is not answerable for the damage done to the plaintiff's dog, because the dog had no right to be where the dog-spear by which he suffered was planted. Since I heard my brother DALLAS's statement of the case put by Lord KENYON in *Brock v. Copeland*,† I have thought that that was also a strong authority against the plaintiff. The defendant in that case kept a mischievous bull in a close of his own, and the plaintiff, crossing this close, was gored by the bull. It was farther proved that the defendant *had acquiesced in the use of a way over his close, and that the plaintiff was passing along such permitted way. Upon this ground, Lord KENYON, and afterwards the Court of King's Bench, held that the action was maintainable; because the defendant had held out to the plaintiff and the rest of the public, that they had a right of passage through his close, and having encouraged them to exercise the right, he must not annoy them in the act of using it. But for this, it was admitted, that the action could not be maintained; because, though the defendant's bull was mischievous, the plaintiff would have had no right to enter the close in which he was kept, and consequently would have had no just cause to complain of the hurt he received there. If the plaintiff's dog had escaped into the close, and been gored by the bull, the consequence would have been the same: the plaintiff would have had no ground of complaint, because his dog had no right to be where the bull was kept; and so it is here. And the true test, by which to try whether such an action as the present be maintainable or not, is, to ask, whether the man or animal that suffered, had or had not a right to be where he was when he received the hurt. I may

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† 5 R. R. 730 (1 Esp. 203).

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add to this, that the absence of all authority and precedents for maintaining such an action, furnishes in itself the strongest argument against it.

Having stated the grounds upon which I think that this action cannot be maintained, either upon principle, or authority, I shall proceed to examine the reasoning by which the plaintiff has endeavoured to support it, confining myself to the arguments used at the Bar, upon which alone I think myself at liberty to observe.

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First, it has been argued, that the plaintiff having started this hare on ground over which he was permitted to sport, had a legal right to follow it, by himself and his dogs, over the land of the defendant, and *would not himself have been a trespasser in so doing. If this position were law, the present action might certainly be supported upon the principles which I have before stated, because the plaintiff's dog would then have a right to be where he was, and the defendant would have had no right to obstruct him. But the law is clearly otherwise: the plaintiff would in such case be clearly a trespasser himself, (see *Sutton v. Moody*),† and his dog was at all events wrongfully upon the defendant's land, whether the master was answerable in trespass for the act of his dog, or not.

Secondly, it has also been said, that because I could not justify killing or maiming dogs, which were found wandering over my land without right, therefore I cannot justify the setting up a defence which is likely to produce the same effect. But the two cases are widely different. In the one I make an immediate and direct attack on the animals, with no object in view but their destruction, which I have no right to effect, if they can be removed from my land by less violent means; in the other, I merely set up a guard against all wrong-doers generally; the primary object of this guard was protection to my own property, not mischief to theirs. The mischief produced was incidental, and arose entirely from their transgressing the bounds within which they ought to have been confined. To make any thing of this argument, and to found any certain rule upon it, it must be carried to the extent of proving that we can set up no defence

† 1 *Ld. Raym.* 251.

for the protection of our houses or land, which is likely to produce more injury to aggressors, than we could legally inflict upon them, if caught in the act of aggression ; for otherwise we shall be left without any rule at all. But such a proposition can never be supported. Almost *every defence which we set up is of this description. A spiked gate to a field, or broken glass on a garden wall, will inflict wounds on men or animals who endeavour to break over them, which, if the owner of a field or garden found them therein, he would not be justified in inflicting ; yet it never was doubted, that such defences might lawfully be set up by every man in his own land, because general prevention, and not particular mischief, was his primary object.

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Thirdly, another ground taken in support of this action, was, that the owner of a dog is not answerable in trespass for aggressions committed by it against his will upon the land of others. Be it so ; but this, as I have before observed, furnishes no argument against the land-owner's right to set up such guards as he pleases upon his own land, against such aggressors. If I have no remedy against the owners of dogs that wrongfully break in upon my property, it is surely the more reasonable that I should be permitted to use effectual means for stopping them.

Fourthly, the want of a sufficient fence to keep dogs out of the defendant's wood, has been urged against him, but this, as it regards the present case, is, I think, the fault of the plaintiff, and not of the defendant. The defendant and Mr. Townsend have land adjoining to each other, not separated by any sufficient fence. Neither of them is bound to erect such a fence ; but either of them may do it ; and if Mr. Townsend chooses to sport upon his own land, with a dog too ungovernable to be prevented from wandering into the defendant's, where he has no right to go, it is his business to set up a sufficient fence to prevent this, or he must take the consequence. I put this as the case of Mr. Townsend himself, because it is impossible that the plaintiff, who acted only under his licence, can be in a better situation than he would himself have stood in.

Fifthly, it has been likewise urged in illustration of the doctrine contended for by the plaintiff, that he who plants an instrument for destruction within the limits of his own ground,

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to deter trespassers from entering upon it, is criminally answerable for all the consequences that may ensue therefrom, and from hence it has been argued, that he must be civilly answerable for all damage occasioned thereby. I am by no means prepared to adopt this as a position which cannot be controverted, nor do I think, that, if established, it would necessarily lead to the conclusion which the plaintiff would draw from it; but at all events, it presents a very different question from the present, and may turn upon very different considerations. It is enough to say at present, that this point has never been decided, and that the case now before us does not call for any decision upon it.

These are the arguments which have been produced in favour of the plaintiff's action, and as they have failed in convincing me that it is supportable, I think for the reasons which I before stated, that there must be judgment for the defendant; but as the Court is equally divided, regularly no judgment can be given. If, however, the plaintiff thinks fit to avail himself of the suggestion of my brother BURROUGH, judgment may be entered for the defendant, in order that the plaintiff, if he shall be so disposed, may carry the matter farther; if he shall not be disposed so to do, no judgment at all is to be entered.

C. P. TRINITY TERM.

1817.
June 14.

POWELL v. GRAHAM, EXECUTOR OF GRAHAM.†

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(7 Taunt. 580—587; S. C. 1 Moore, 395.)

A promise made upon good consideration by a testator, that his executor shall pay, is a sufficient consideration for an action in *assumpsit* against the executor.

And in such action, it is neither necessary to aver assets nor a promise by the executor; by three, BURROUGH, J. *dissentiente*.

On a count averring an account stated by the defendant of monies due from him as executor, the judgment shall be *de bonis testatoris*.

It may be therefore joined with counts on promises of the testator.

THE plaintiff declared in her first count on an *indebitatus assumpsit* for wages or salary due to her from the testator, for her service as his servant; and *averred a promise by the testator to pay, but shewed no breach. The four next counts were the usual money counts, alleging that the testator was indebted, and that the testator promised to pay, and shewed a breach in the non-payment either by the testator in his life-time, or by the defendant, executor as aforesaid, since his decease, not averring assets. The plaintiff farther declared, that in the testator's life-time, in consideration that the plaintiff, at the testator's request, would enter, (as she stated it in the sixth count,) and (as she averred in the seventh count) had entered, into his service, as a nurse and housekeeper, and would continue to serve him as such, until his death, at certain wages, to wit 20*l.* per annum; the testator undertook, that his executors should after his decease pay, as such his executors, to the plaintiff a certain sum, to wit, 20*l.* and she averred her service and continuance therein to his death, and notice after his death to the defendant as executor, and that by reason of the premises, the defendant became liable as executor to pay the plaintiff that sum, and in consideration thereof promised to pay whenever he

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† Cited in judgment of *Furhelt v. Furhelt* (L.JJ. 18 Nov. 1871) L. R. 7 Ch. 123, 127; 41 L. J. Ch. 143, 148; and there held that an executor borrowing, though expressly in the

character of executor, but without consideration moving from the testator, does not bind the testator's estate.—R. C.

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the defendant, executor as aforesaid, should be requested. In the eighth count the plaintiff averred that in the testator's lifetime, in consideration that she was in his service, and would be therein at the time of his decease, the testator promised her, that his executor should in a reasonable time after the testator's decease, pay, as such his executor, a certain sum besides her wages, and she averred that she was in the testator's service at his death, and notice after his death to the defendant, whereby, and by a reasonable time being elapsed, the defendant became liable, as executor, to pay, not averring any promise of the executor made in consideration of that liability. In the ninth count she stated that the defendant, as executor as aforesaid, after the testator's *death accounted with the plaintiff of monies from the defendant as executor to the plaintiff due, and was found indebted, and the defendant as executor, in consideration thereof, promised to pay the last mentioned money, and avers that the defendant, executor as aforesaid, hath not paid, although the defendant as executor, was requested. The defendant demurred, and assigned for causes, that the several counts and the causes of action therein mentioned were misjoined, inasmuch as the last count stated a contract and cause of action not arising till after the testator's death, although the several other counts were on contracts with the testator. The plaintiff joined in demurrer.

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This case was twice spoken to in Easter Term, by *Vaughan*, Serjt. in support of the demurrer, who on both occasions was requested to postpone the conclusion of his argument that the defendant's counsel might more fully consider how the 7th, 8th, 9th, and 10th counts were affected by the doctrine held in *Rann v. Hughes*.†

Vaughan in support of the demurrer, contended; first, that the joinder of the 8th count with the preceding counts was a misjoinder of action, because, as he assumed, upon the 8th count the executor would be chargeable *de bonis propriis* and not *de bonis testatoris*. For this proposition he cited *Rose v. Bowler*,;

† 7 T. R. 350, n.; 7 Bro. Parl. Cas. 550. † 1 H. Bl. 108.

which he supposed to overrule *Segar v. Atkinson*,† and he distinguished this case from *Powley v. Newton* ‡ by the difference which exists between a plaintiff executor and a defendant executor, the effect of which distinction was recognized by the Court in the case of **Ord v. Fenwick*;§ *Elwes v. Mocatoe*,|| which was cited in *Segar v. Atkinson*, was in like manner the case of a plaintiff executor. *Ellis v. Bowen* ¶ would be cited by the plaintiff, but it was precisely similar to *Segar v. Atkinson*. Secondly, the 8th count, considered by itself, was defective. *Brigden v. Parkes* †† also shews that there is a misjoinder here. It was necessary here, at least to aver that the defendant had assets, and that the defendant, in consideration of having assets, promised to pay, as was done in *Lee v. Muggeridge*,‡‡ without which averments, that action could not have been supported.§§ In the actions for legacies which the Courts for some time entertained, there was uniformly an averment of assets, as in *Hawkes v. Saunders*,||| and in *Atkins v. Hill*.¶¶ In *Rann v. Hughes* there is an averment that the defendant, being liable, promised. In *Deeks v. Strutt*,††† the last case decided upon the question of suing for legacies in the common law Courts, there was an averment of assets, and of the defendant's consequent liability, and a promise to pay. At least it must be necessary to aver either the possession of assets, or an express promise of the testator, if not both. He referred to the authorities collected in the first part of a note in *Coryton v. Lithebye*,‡‡‡ not advertng to the correction, which subsequent decisions had impelled the learned editor to subjoin in the latter part of the same note.

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Best, Serjt. *contra*, contended that there was no misjoinder, because the defendant, upon his account stated *of monies due from him as executor, was liable *de bonis testatoris*, and not *de bonis propriis*: for this proposition *Ellis v. Bowen*, and *Segar v.*

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† 1 H. Bl. 102.

‡ 6 Taunt. 453.

§ 3 East, 104.

|| Cit. in 1 H. Bl. 102; and in *Jenkins v. Plume*, 1 Salk. 208.

¶ Forrester, 98 or 198.

†† 2 Bos. & P. 424.

††† 5 Taunt. 36.

§§ 1 Salk. 208.

||| Cowp. 289.

¶¶ Cowp. 284.

††† 5 T. R. 690.

‡‡‡ 2 Wms. Saund. 117 e, written before the decision in *Ord v. Fenwick*, and others of that class.

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GRAHAM. *Atkinson* were directly in point. And he cited *Judin v. Samuel*,† and *Powdick v. Lyon*,‡ as establishing, that if either count in the declaration were good, there being no misjoinder, the plaintiff was entitled to judgment on that count. The cases of actions for legacies were long since exploded, but while they were recognized, there was a reason for an averment of assets in these cases, which does not exist here, namely, that until all the debts are paid, the executor is not warranted in paying legacies ; and the averment there, consequently, was not an averment of assets generally, but of assets beyond what sufficed to pay all the debts. The same distinction made an express promise in those cases necessary. But it has never been necessary for a creditor of the deceased to aver assets ; for the plaintiff cannot know whether the executor has assets or not, the want of assets is to be set up by the executor as matter of defence. The 8th count is good, for it shews a good cause of action ; viz. a good consideration moving to the testator, and a promise made by him thereon, and an averment that the executor, in consideration thereof, became liable : *Lee v. Muggeridge* is irrelevant. *Brigden v. Parkes* was decided upon the ground that the defendant is not stated to have accounted “as executor,” though he is styled by the addition “executor as aforesaid.” *Rann v. Hughes* is not applicable to this case.

GIBBS, Ch. J. :

[*585] We are all of opinion that there is no misjoinder ; but on the first point my brother BURROUGH differs from the rest of the Court. This action is brought by the plaintiff against the representative of *the deceased, upon a promise by the deceased that his representative shall pay so much money to the plaintiff : if the representative does not pay that money, it is no breach of any promise of the representative : but it is a breach of the promise of the deceased. If the deceased has left assets, the representative is bound to apply them in satisfaction of the testator's engagements. If the representative will not pay, what is the remedy ? How can the person to whom the promise is made, possibly recover the money, but by bringing an action

† 1 Bcs. & P. (N. B.) 43.

‡ 11 East, 565.

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against the executor, and therein treating this as a debt completely due to her on the promise of the testator, and stating that the executor is bound to pay her out of the assets? What is the consequence? If the defendant has no assets, he may plead it, and the plaintiff can have judgment *de bonis quando*. If she cannot have this action, she is completely without remedy, unless the executor chooses voluntarily to pay her. If the defendant has no assets, I am of opinion that that fact ought to come, as matter of defence, from him, and therefore that the plaintiff may recover on the 8th count. Supposing that count to be bad, the plaintiff is entitled to judgment on all the other counts, for is there any misjoinder? In all of them the defendant is charged either on the promise of the testator, or on a promise made by the defendant as executor. A count on a promise made by the defendant as executor has no force farther to charge the defendant, than a count on a promise of the testator. In several cases the defendant has been charged as promising as executor, and yet he has been held liable *de bonis propriis*; but that is, because in those cases, the nature of the debt has been such, as necessarily made the defendant liable *de bonis propriis*. For example, where there has been a count against him for money had and received by him as executor, if he receives the money, he must be personally liable. So, *of money lent. So, of money due on an account stated. But this proposition must be confined to the case of an account stated of money received by himself personally. If this distinction be attended to, it preserves all the cases from the charge of inconsistency. Every case, though apparently discrepant, may be reconciled in this mode; and therefore I am of opinion that there is no misjoinder here, and that neither of the counts, separately, is liable to the demurrer.

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PARK, J. :

The rule has been well laid down by my Lord Chief Justice, and the question is, whether the same plea can be pleaded to all these counts, and the same judgment given on all. If money were lent to an executor himself, even though it were to be employed for purposes of the testator, yet the loan is made to

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the executor himself; and thus are reconciled the judgments given in this Court by a very learned person in two cases of *Segar v. Atkinson* and *Rose v. Bowler*. The justice of the case is with the plaintiff, and I concur in the judgment given by my Lord Chief Justice.

BURROUGH, J. :

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A promise made by a testator that his executor shall pay, is not *primâ facie* binding on the executor: in order to make it binding on him at all, it is necessary to go farther, and to shew that he has the means of paying. This was so held in a case of *Williamson v. Losh*, in 1774, in the Court of King's Bench; and the case of *Perrott v. Austin*† was there cited, wherein the Court say, "if one covenant that his executors shall pay 10*l.*, debt lies not against his executor." *Williamson v. Losh* was an action on a note in writing given by the testator, promising that his executor should pay his niece 100*l.*; and the impression made on *the Bar was, that but for the express averment of assets, the executor would not have been liable. I have above said, that no action lay against the executor, on the promise of the testator; and how should it? for it is only in consequence of the assets coming to hand, that the executor is liable to disburse. This was so thought by the pleader who drew the declaration in *Lee v. Muggeridge*: he has made an averment of assets, framed according to the declaration in *Williamson v. Losh*. It is said that the plaintiff is aided by the averment, that the defendant, as executor, became liable to pay: that is an averment of a mere consequence of law, and does not assist him. If this cause were tried, it would be incumbent on the plaintiff to shew that the defendant had assets, or he could not recover; for here the debt was not complete in the testator's time: in the other cases the debt is complete before the action is brought. I therefore differ from the rest of the Court in thinking this count is bad, but the judgment upon the other counts must be for the plaintiff.‡

† Cro. El. 231.

‡ Dallas, J. was absent this day in consequence of indisposition.

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(7 Taunt. 592—596; S. C. 1 Moore, 322.)

1817.
June 17.

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Where the purchaser at an auction of a reversionary interest in bank stock, upon failure of the vendor to deduce a title, had recovered back the deposit in an action against the auctioneer, held that he might nevertheless recover interest on the deposit in an action against the vendor for not completing his contract, under an averment as special damage that the plaintiff had lost, by reason of the non-performance, the interest and benefit of his money.

THIS was an action brought on the non-performance of a contract against the defendant, who had exposed to sale by auction a reversionary interest in certain bank stock, which the plaintiff had contracted to purchase, upon the terms, (amongst others,) that he should pay down a deposit of 20 per cent., and sign an agreement for payment of the remainder on having a good title. The plaintiff had been declared the highest bidder, and had paid a deposit of 248*l.* into the hands of the auctioneers, Messrs. Hoggart and Phillips; whom, after four years, the title not being satisfactorily deduced, he sued for principal and interest, and recovered the principal only. He now averred in his declaration against the defendant, as a special damage, the payment of 240*l.* deposit, and that by reason of a good title not having been made, he had lost the interest and benefit of the deposit for four years and thirty-two days, and had paid 10*l.* for investigating the title, *and 20*l.* for the costs of suing the auctioneers. The defendant suffered judgment by default, and upon the execution of a writ of enquiry in London, the secondary held, first, that the plaintiff could not recover interest on 248*l.* the extent of his deposit alleged being only 240*l.*; but, secondly, it being proved that the plaintiff had declared for this same interest in his action against the auctioneers, the secondary held, that though he had not therein recovered it, yet as he had in that cause declared for it, he could not now recover it in this action, and the jury did not give the interest.

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Pell, Serjt. on a former day had obtained a rule *nisi* to set aside this inquisition, and execute a new writ of enquiry, against which

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Blosset, Serjt. now shewed cause :

Although judgment by default admits the cause of action,† yet all special damage laid, being mere matter of aggravation, must be expressly proved. The plaintiff is not entitled to this interest as a special damage for this money being detained by the auctioneer, first, on principle, secondly, on two cases; first, the auctioneer is a mere stakeholder, he holds the deposit neither for the one party nor the other; but he holds it until it appears whether a good title be made out or not. The auctioneer has the use of the money. The vendor has no use of the money. *Burrough v. Skinner*,‡ *Edwards v. Hodding*.§ If an action will not lie against the vendor for the principal, unless the auctioneer has paid it over to him, it cannot lie against him for the interest. The plaintiff has made his election to sue the auctioneer for this very interest, and has thereby declared that he looked to *the auctioneer as a depositary for his use; after this, he cannot sue the principal for it.

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Pell maintained his application on the ground that in an action on a contract which was broken by the defendant, it was open to the plaintiff to shew the different sorts of damage which he had sustained by reason of the non-performance of the contract. For the defendant it had been argued, that if the plaintiff were entitled to interest at all, he must be entitled to recover it against the auctioneer, because he had had the money. But the auctioneer with more reason had urged, that if the plaintiff was entitled to interest at all, it must be to recover it from the principal.

GIBBS, Ch. J. :

This is an action against the vendor of an estate, who acted through an auctioneer; and the single question is, whether the plaintiff, on this declaration, be entitled to recover what he has lost of interest on his deposit, in the shape of damages. It is certainly laid down in many modern cases, that if money be lent

† *East India Company v. Glover*,
1 Str. 612; *De Gallion v. L'Aigle*,
1 Bos. & P. 369.

‡ 5 Burr. 2639.
§ 15 R. R. 662 (5 Taunt. 815; 1
Marsh. 377).

or money received, without a precise time stipulated for the repayment, interest cannot be recovered, unless there subsist a specific contract for it. Here the plaintiff, knowing that the money was paid to the auctioneer, to be held merely as a stake, subject to be instantly paid over on performance of the contract at any time, could not recover interest against him, unless under particular circumstances. If, indeed, it had appeared that the auctioneer had actually made interest of the money, it might have been a question, whether that interest might not be recovered against the auctioneer. But here is a contract, that 20 per cent. shall be paid in part of the purchase-money, as a deposit, and that the residue shall be paid on the purchaser having a good title. The plaintiff sues, and alleges as a part of the damage, *which he says he has sustained, that he has lost, from the time when the contract ought to have been completed, the use of the sum which he had deposited towards his performance of the contract. There was a case tried before Lord Ellenborough, Ch. J. hardly distinguishable from the present. *De Bernales v. Wood.*† That was an action in which the plaintiff recovered back a deposit from the auctioneer himself; so it went even farther than I should have thought it necessary to carry the law in the present case. In many cases it has been held, that on the mere fact of one man having in his hands the money which belongs to another, interest is recoverable. I am aware that that was a case against the auctioneer, and that on the principles laid down, an auctioneer generally is not liable for interest, but he may by his conduct render himself liable. *E.g.* if, when the title ought to be made out, the auctioneer was called on to pay over, and refused, he might be liable from that time. I only throw out this, that we may not appear to impugn a case in the Court of King's Bench, of which the circumstances do not appear. I therefore think that in the present case, the plaintiff is entitled upon this declaration to recover.

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PARK, J. :

The law has been laid down that on a mere loan of money, or a mere money transaction, interest is not a necessary consequence.

† 3 Camp. 258.

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This has been so held in many cases, and very recently in *Calton v. Bragg*,† which was tried before Lord Ellenborough only two Terms before this case, and that case was never afterwards moved in the Court of King's Bench.

BURROUGH, J.:

[*596] This case leaves *Calton v. Bragg*† wholly untouched, and proceeds on the grounds mentioned in the first count, which, if I had read, I should *not, even as counsel, have alluded to the case of *Calton v. Bragg*.†

Rule absolute for a new writ of enquiry.‡

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June 20.

BLINKINSOP v. CLAYTON.

(7 Taunt. 597—599; S. C. 1 Moore, 328.)

[597]

If a purchaser of goods draws the edge of a shilling over the hand of the vendor, and returns the money into his own pocket, which in the north of England is called the striking off a bargain, this is not a part payment within the Statute of Frauds.§

Where a person who has contracted for the purchase of goods offers to re-sell them as his own, whether this is proof of a delivery to himself, is a question for the jury.

In this action the plaintiff declared for horses and goods sold and delivered, and for the keep of a horse sold to the defendant. Upon the trial of the cause, at the York Spring Assizes, 1817, before Wood, B. the plaintiff proved that he had sent his servant with a horse to a fair to sell it, and that the defendant, seeing the horse, followed it into a stable, offered 45*l.* for it, and said he should in half an hour have a stall in his stable vacant to receive it. The plaintiff's servant agreed to accept the sum named, and taking a shilling in his hand, drew the edge of it across the palm of the defendant's hand, and replaced the shilling in his own pocket, which the witnesses called striking off the bargain. The defendant afterwards brought a chapman to the stable, and

† 13 R. R. 451 (15 East, 223).

‡ Dallas, J. was absent in consequence of indisposition.

§ See now Sale of Goods Act, 1893, s. 4 (which is substantially the same).—R. C.

stating to him that he had bought the horse, offered to sell it to him at a profit of 5*l.* which the other, discovering a supposed unsoundness, declined; in consequence of which discovery, the defendant returned to the plaintiff's stable, and declined his purchase. The plaintiff contended, 1st, that the act of striking off the bargain, as above described, bound the contract so as to satisfy the Statute of Frauds; 2ndly, that the defendant's declaration that he had bought the horse, and his attempt to re-sell it, was evidence that the sale and delivery were complete, and entitled the plaintiff to recover. Wood, B. reserved the points, subject whereto the jury found a verdict for the plaintiff.

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Hullock, Serjt. in Easter Term, had obtained a rule *nisi* to set aside this verdict and enter a nonsuit, against which

Copley, Serjt. now shewed cause :

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He contended, first, that the act called the striking off the bargain, which was a term well understood in the North of England, was such a part payment as complied with the Statute of Frauds. It was not invalidated by the money being instantly returned to the seller with the consent of the buyer.

(But the whole Court denied that there was ever any payment or transfer of the shilling, even for a moment.)

Next, if a purchaser treats the property as his own, that proves a sufficient delivery, as was held by Lord KENYON, Ch. J. in the case of the sale of a stack of hay, *Chaplin v. Rogers*,† wherein the defendant had resold a part of it, though he afterwards refused to permit the second purchaser to take it. In *Elmore v. Stone*,‡ there was no actual delivery. The defendant cannot resort to the Statute of Frauds, after he has by his own act acknowledged the purchase. *Searle v. Keever*.§

Hullock, in support of his rule, denied that there was in this case any part payment, or any constructive delivery.

† 6 R. R. 249 (1 East, 192).

§ 2 Esp. Cas. 598.

‡ 10 R. R. 578 (1 Taunt. 438).

BLENKINSOP GIBBS, Ch. J. interposing, relieved him :

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The Court do not go all the way with the defendant on all his points ; but the Court is embarrassed by observing that it was not left to the jury to find whether there was any delivery or not ; and on the first trial of the case of *Chaplin v. Rogers* the jury found there was an acceptance of the hay, and on the second trial they found that it had been delivered ; and we are far from saying that we do not coincide with the learned Baron who tried the cause in his direction, but we think it ought to be left to the jury, to find whether this was or was not a delivery ; *therefore there must be a new trial. This is very different from the case of the haystack, for there nothing more could be done to confer a possession.

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DALLAS, J. :

The only question here is, whether something else remained to be done ; upon that point I have an opinion, but it is unnecessary here to disclose it, and I carefully abstain from stating what it is.

The Court, altering the form of the rule, made it

Absolute for a new trial.



1817.
June 20.

MOORE *v.* THE RIGHT HON. OTHER ARCHER,
EARL OF PLYMOUTH.

[614]

(7 Taunt. 614—627 ; S. C. 1 Moore, 346.)

An exception in a conveyance, made in 1655, of the free liberty of hawking and hunting, does not include the liberty of shooting feathered game with a gun.

Semble that the liberty of hawking and hunting for the grantee, his friends, and servants, is a tenement and entailable.

In trespass the plaintiff declared that the defendant on the 1st of January, 1810, and on divers other days, broke and entered his three closes situate in the parish of Bordesley, in the county of Worcester, naming them, and forced open and broke his gates there standing, and the locks, &c. thereof, and with his own and his dogs' feet, trod down and spoiled his grass and corn there

growing, and with dogs and guns hunted and searched in the said closes for, and shot at hares, pheasants, partridges, and other game, being in the said closes, and killed divers, and carried away and converted them to his own use. The second count was, trespass for forcibly seizing, taking, and carrying away the plaintiff's hares, pheasants, and partridges. The defendant pleaded, first, as to breaking and entering the said three closes, and with feet in walking, treading down, and spoiling the grass and corn of the plaintiff, therein then growing, and with the said dogs and guns hunting and searching therein, for hares, pheasants, partridges, and other game, and shooting off and discharging the guns so loaded with *gunpowder and shot, at and against the hares, pheasants, and partridges, found and being in the said closes, and killing and destroying the hares, pheasants, and partridges being upon the said closes, and carrying away, and converting, and disposing thereof to his own use, and thereby encumbering the said closes, and hindering and preventing the plaintiff from having the use, benefit, and enjoyment thereof, in so large and ample a manner as he might and otherwise would have done; that the said three closes at the said several times when, &c. were and now are part and parcel of the premises in these pleas hereinafter mentioned, and in the indentures in this plea herein mentioned and referred to more particularly described; and that heretofore, and before the times when, and before the making these indentures, to wit, on 27th February, 1655, the Right Honourable Thomas Windesor, Lord Windesor, being entitled to the equity of redemption of and in the premises in and by the indenture next herein mentioned, conveyed, and John Langham, of Cotteybrooke, in the county of Northampton, Esq., and Stephen Langham, of London, merchant, third son of the said John Langham, being seised in their demesne as of fee, subject to the said equity of redemption, of and in the premises, by indentures of lease and release between Lord Windesor, of the first part; J. Langham and S. Langham, of the second part; and Thomas Foley, of London, Esq., and Richard Jones, of Putney, in the county of Surrey, Esq., of the third part, Lord Windesor, and J. Langham, and S. Langham, at and by the entreaty and appointment of Lord Windesor, for the considera-

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tions in the said indenture mentioned, granted, bargained, sold, aliened, released, and confirmed, unto T. Foley and Jones, and the heirs of Foley for ever, all that park or inclosed or impaled ground, called or known by the name of Bordesley, *otherwise Borsley park, together with divers other premises in the said first-mentioned indenture particularly mentioned and described, and among others the several closes in which, &c. Excepted, and always reserved out of that grant, free liberty of hawking and hunting in, over, and upon any of the premises, for Lord Windesor, and the heirs of his body, and his and their friends, servants, and followers; and that the premises whereof the several closes in which, &c. are parcel, by mesne assignments, afterwards, and before the time when, &c. came to and vested in one Henry Geast, that Geast demised the places in which, &c. amongst other premises, to the plaintiff; that the plaintiff by virtue of such demise became, and at the time when, &c. was the tenant of Geast, of the several places in which, &c.; that he the defendant at the times when, was, and now is heir of the body of Lord Windesor, and by reason thereof, and of the premises, did, in the exercise of the free liberty so excepted and reserved out of the said conveyance of hawking and hunting in, over, and upon the premises whereof the closes in which, &c. were and are parcel, commit the several supposed trespasses in the introductory part of this plea mentioned, as he lawfully might, for the cause aforesaid. The third plea stated the conveyance of 1655 as a grant by the Langhams, at the appointment of Lord Windesor, to T. Foley, omitting to aver the grantor's estate, and Lord Windesor's seisin of the equity of redemption, and justified as in the second plea. Fourthly, the defendant pleaded a licence. The plaintiff demurred to the second plea, and assigned for causes, that whereas the said defendant thereby had professed to justify all the trespasses in the first count, under the reservation in the grant by Lord Windesor in that plea mentioned, viz. the free liberty of hawking and hunting in, over, and upon those closes for Lord *Windesor and the heirs of his body, and his and their friends, servants, and followers, yet the defendant had not by that plea justified the hunting and searching with the dogs and guns in the said closes, for the hares,

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pheasants, partridges, and other game, discharging the loaded guns and shooting at the hares, pheasants, and partridges found in the closes, nor the killing and destroying the hares, pheasants, and partridges, being in the closes, and in the first count mentioned, inasmuch as the reservation to hunt and hawk so reserved, did not justify the hunting and searching with dogs and guns for the hares, pheasants, partridges, and other game, nor the discharging the loaded guns at the hares, pheasants, and partridges, nor the killing nor the destroying the pheasants and partridges in the first count mentioned, nor the said hares in that count mentioned, otherwise than by hunting the same. And he traversed the licence stated in the fourth plea.

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Blosset, Serjt. in support of the demurrer, urged, first, that the reserved right to hawk and hunt, if good at all, was good only for the life of Lord Windesor, but void so far as it was a limitation to the heirs of his body. Secondly, that the reservation was void, as being made to persons who were strangers to the estate in the land. Thirdly, that the liberty to hawk and hunt did not include the entering and destroying partridges, pheasants, and other feathered game, by shooting it with guns.

As to the first point, this is a mere personal privilege, carrying with it no interest in the land, nor any profit to be derived out of the land. It is like the exception of a way, and many other easements of the same nature, which are good as personal grants, but not in gross; nor do they become transmissible or assignable, unless made appendant, appurtenant, or *otherwise annexed to land.† It is therefore a question, how far a personal right like this to one person to shoot over another man's ground, can be granted to a man, and the heirs of his body. This is not such a tenement or interest as is intailable.‡ If, though not intailable, it can otherwise be settled on a man, and the heirs of his body, it is a conditional fee at common law; and the condition being performed by the first Lord Windesor, by his having heirs of his body, he was at liberty to alienate this right. This shows, that because it is not transmissible, yet it is transmissible;

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† 2 Bl. Com. 35.

‡ Litt. s. 13; Co. Litt. 20 a, 206

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and so on account of the absurdity, it cannot be so limited.† If an interest were granted to a man, and his heirs, to enter the grantor's kitchen and eat his dinner, it would not descend to the heirs, nor can it be granted over. So, a licence to hunt, whether to take a pheasant, sparrow, or bee, matters not. No one instance is found, of a grant of a licence to a man, and the heirs of his body. If it be argued, that though not assignable, it is descendible to Lord Windesor, and the heirs of his body, so long as they endure, then it is void, because it is *quodam modo* a service annexed to the land, and therefore bad by the statute *Quia emptores*,‡ *Bradshaw v. Lawson*.§ A copyhold was enfranchised by feoffment, reserving to the lord a rent stated to be the ancient rent, and a covenant was executed by the grantee, to pay to the grantor the ancient rents and services, held that the covenant was void by the statute *Quia emptores*. There is no difference between enfranchisement on the reservation of ancient services, and a grant with a reservation of new services. So, neither can this reservation be annexed to an old estate. A reservation may *be bad for uncertainty, as a custom to play cricket in certain ground. *Fitch v. Rawling*.|| So this reservation is not confined to Lord Windesor, and the heirs of his body, but extends to his and their friends. It never can be an issue, whether A. or B. is Lord Windesor's friend, and therefore, not being limited to his friends in company, or the like, is too general.

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Next, the reservation is void, as being made to strangers to the deed.¶ The law can take no notice of an equity of redemption; and therefore Lord Windesor is a stranger to the fee. In a lease and release, being a grant of an estate by a mortgagee, the mortgagor joined, and had a reservation to himself of the right to dig coals, and it was held that the reservation was void. It was, in fact, a covenant of the lessee, that the mortgagor might dig for coals, but notwithstanding that covenant, the Court held the reservation void. The covenant, LAWRENCE, J. says, could only operate as a grant; but a grant will not pass the land

† Bro. Abr. 64; Licence, pl. 10.

‡ 18 Edw. I. st. 1.

§ 2 R. R. 429 (4 T. R. 443).

|| 3 R. R. 425 (2 H. Bl. 393).

¶ Shep. Touchst. 80.

itself without livery. *Chetham v. Williamson*.† So here, this is void as a grant, for want of livery. In *Mountjoy's* case,‡ there cited, it was held that an interest to enter and dig coals, is an interest in the land.

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As to the third point, the liberty to hawk and hunt does not extend to shooting, *i.e.* to entering a man's land for the purpose of destroying partridges and pheasants with guns. This sort of licences is to be construed strictly.§ It is to be considered, that in fact both guns, and the shooting and sporting with guns, were familiar to persons of distinction, long before the date of this deed. The statute 33 Hen. VIII.|| interdicts *low persons from shooting with guns. The statute 3 Edw. VI.,¶ forbids any under the degree of a lord from shooting with hail shot or more pellets than one. There is a very good reason why a person who gives such a permission to hunt, should not licence shooting, though he might permit hawking and hunting; for shooting is more destructive to the game, and more dangerous to the owner of the estate, if the heir of Lord Windesor's body happened to be an awkward sportsman. The statute 4 & 5 Will. & M.†† prohibiting inferior tradesmen from hunting, hawking, fishing, and fowling, may by "fowling" mean netting the birds. If hunting includes shooting, it also includes netting, the most destructive of all modes of taking them.

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Lens, Serjt. *contrà*, first addressed himself to the last head :

Hunting is a most generic name; it would include hawking; and if hawking had not been so grand a distinction, no doubt it would have passed by the term "hunting." The grantor has not said whether it be the hunting of beasts or of birds, which he excepts. Hunting is used in the latter sense by our best writers. "A hunter Henry is, when Emma hawks." "A sequestered stag who from the hunter's aim had taken a hurt." Henry ‡‡ the

† 4 East, 469.

‡ Godb. 17; Co. Litt. 164 b, 165 a, and Harg. note 5; 1 Anders. 307; Mo. 174.

§ Manw. 8vo, last [4th, 1717] edit. 188, found c. 18, s. 3, p. 125, of edit. Lond. 1615, 4to; Vin. Abr. Licence, C. D.

|| 33 Hen. VIII. c. 6 [repealed, 1 & 2 Will. IV. c. 32, s. 1].

¶ 3 Edw. VI. c. 14, repealed by stat. 6 & 7 Will. III. c. 13, s. 3.

†† 4 & 5 Will. & M. c. 23, s. 10 [repealed, 1 & 2 Will. IV. c. 32, s. 1].

‡‡ *Sic* in the report. It should of course be *William*.—F. P.

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Second was killed by the arrow of a hunter; that was the original mode of hunting. There is danger too in hunting with dogs: witness Actæon's fate. This is but an indulgence coupled with an interest: the grantee wants nothing but a licence to enter the lands; no interest in the soil is wanted, and though, if it be necessary, as in *Chetham v. Williamson*, to except an interest in the lands or a grant out of the lands, it might be insufficient, yet that is not here wanted. The statute of *Hen. VII.† against the taking of pheasants and partridges, recites, that "the owners leese not only their pleasure and disport, that they, their friends and servants should have about hawking, hunting, and taking of the same" (thus applying the term hunting to winged game, pheasants and partridges). The art of shooting birds flying could not have been very successfully pursued with the matchlocks and demi-culverins which were in use at the period of this grant.

Next, this licence is not restricted to Lord Windesor for life, this is an interest which may be entailed within statute *De Donis*; but if not, it will be a fee-simple conditional; and though alienable by performance of the condition, the grantee is not bound to alienate it; and if he alienates it not, he still has the conditional fee in him, though not restrained from alienating by the statute *De Donis*. It has been argued that this is no more than a way, and an easement, which dies with the grantee, unless attached to land. The plaintiff's counsel does not illustrate how it is that a right of way to a man and his heirs may not exist, though not assignable. An annuity to a man and his heirs is not entailable, yet it is assignable; no analogy exists between the two qualities, each must be kept within its own limits. Next, this is within Lord Coke's comment, a tenement.‡ "Tenements, *tenementa*. This is the only word which the statute of Will. II. useth, that createth estates tail, and it includeth not only all corporate inheritances which can or may be holden, but also all inheritances issuing out of any of those inheritances, or concerning, or annexed to, or exercisable within the same, though they lie not in tenure; therefore all these without question may be intailed." This is a privilege exercisable within lands, within

† 11 Hen. VII. c. 17 [repealed, † Co. Litt. 19 b, 20 a.
 1 & 2 Will. IV. c. 32, s. 1].

the lands conveyed. It is *no right to any thing personal, or exercised about chattels (the test by which Co. Litt. distinguishes the matters which are not entailable). Roll.† also marks the distinction between those things which are purely personal and those things which, though of a personal nature, are to be exercised within land. *Neville's*‡ case, a dignity may be entailed, though it cannot be assigned, as the earldom of Northumberland. And it may be forfeited, though a more distant connection between two things cannot be imagined, than between title and the land in the county of which it is named. *Davis's* case.§ Held a good prescription for a right for all the tenants and farmers of the lord of a manor to fowl within the plaintiff's free warren. The lord may prescribe for his tenants; if the land be copyhold and the right be claimed as a custom, the lord must prescribe; if the freehold be in the tenant, the tenant must prescribe. Possibly these might be freehold tenants; and it was held that *aucupium, avium captio*, was a profit *apprendre in alieno solo*, which tenants might have, as tenants, in their own character, and so, not altogether unconnected with the manor.|| “The same law is, if a man licence me and my heirs to come and hunt within his park, it behoves me, or is convenient (*convenient*,) here to have a writing of this licence, because a thing passeth by this licence, which is to endure to perpetuity; but if he licence me to hunt once in his park, this is good without writing, because no inheritance passes.” So, if it were to him for his life; that might always be pleaded without shewing written licence. From the circumstance stated in the third plea, of Lord Windesor's consenting to the grant by Langham, *it must be presumed he had an interest of some sort; for the grantee has accepted a grant in which Lord Windesor is an acting party, and the grantee, it must be presumed, would not have required or consented thereto, unless Lord Windesor had had an interest. And though he purports to exercise a power of appointment, yet if he has an interest, his interest shall pass. But here is wanting no more than an

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† 1 Roll. Abr. 837, line 50, citing *Manzrell's*, 2 & 3 (the Supplement to Plowd.), and *Nevill's* case.

‡ 7 Co. Rep. 33 b.

§ 3 Mod. 246.

|| 11 Hen. VII. fol. 8 b.

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excuse for coming on his land; and though Lord Windesor has given it in an informal way, it shall operate as a licence, though not in terms an interest. For the purpose of this act a grant is not necessary, a mere consent suffices; and yet a grantee to some purpose is a grantor, and regrants a thing now in substance created for the first time. It is said, this is a creation of holding of lands by service, created since the statute *Quia Emptores*. This is no new holding: the privilege granted, and the land over which, are both held of the same lord. The case bears not the most distant resemblance to *Bradshaw v. Lawson*, where a reservation of the ancient rent would have enured to create a new holding. The argument, that this would become a feudal relation, loses sight of the nature of the thing; no homage, no feudal service is to be done here. Lord Windesor's friends must be the friends accompanying him at the time, and a stranger coming could not protect himself as Lord Windesor's friend. Even if the term "friends" were too vague, still that would not avoid the grant, so far as it was to Lord Windesor and the heirs of his body, (though the interpretation is obvious, that they are such as make part of his friendly retinue.) The circumstance of its being a grant to a man and his servants, shews that he has an interest in the game.† If he has a licence *for him and his servants to hunt at his pleasure, he may also kill and carry away; for the licence for the servant imports an interest in the thing. But a licence to enter and kill, does not authorize to take away, but only to sport. A receivership of a manor, as it is held in *Manxell's* case, may be entailed, for it is within the statute *De Donis*, for it is to be exercised in land; so is this therefore a matter which either may be entailed, or limited as an original fee-simple conditional; it cannot therefore be considered as a matter purely personal. This is no part of Lord Windesor's old estate, but he is the grantee of a grantee of a new matter which is not a part of his old estate, but the grantee agrees that he shall have it: for it appears on the pleadings that the deed sealed with the seal of Thomas Foley.

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† Co. Dig. Chase, II. 1, Manw. p. 129, of 4to edit. Lond. 1615.
cited as 279, 280, found c. 18, s. 5,

Blosset, in reply :

First, this cannot be made available as a grant, for it is not pleaded as a grant. Secondly, it cannot enure as a grant, because it is by bargain and sale, which only passes an use. Thirdly, an easement to enter for a particular purpose, as to sit at a cotton mill, is no tenement, as hath been held in settlement cases, though it be profitable to the grantee. The distinction adverted to appears in *Fitch v. Rawlings*, that legally settled inhabitants might play at cricket, but inhabitants for the time being could not : but this description of “ friends ” is too general, and being too general, it destroys the whole : for the reservation cannot be good in part, and bad in part. The argument drawn from the statute *Quia Emptores*, is not that the lands are holden by the grantee by the service of suffering Lord Windesor to sport on this land, but that the statute *Quia Emptores* precludes the creating new charges of this nature on land, as well as alienations of land on new services.

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(CURIA, *contra*.)

On *the reservation to Lord Windesor and his servants, the authority cited from Co. Dig.† affords an answer to several other authorities cited from ancient books ; the words are, “ the licence for the servants imports an interest in the *thing*, not in the land.” Warren, chase, and park, are incorporeal hereditaments, and a grant thereof conveys an interest in the thing, *i.e.* in the game, not in the land. And a warren, park, or chase, may be granted to a man and his heirs, but there is no instance that an easement may be granted to a man and his heirs. In 3 Mod.‡ it is in a warren. That which is granted to a man and his heirs in a park, must be a perpetuity, and must be by deed. The case cited is of a licence to one and his heirs, to hunt in my park, not in my land. It is said, this, though not a regular grant, is an assent by the grantees ; if so, it ought to have been pleaded as a licence by the original grantee ; but it is impossible that an assignee of the land after so many hundred years, can be considered as now licensing, or bound, by this licence. So

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† Co. Dig. tit. Chase, II. 2.

‡ *Davis's case*, 3 Mod. 246.

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far as there is an interest in the game, in warren, park, and chase, it may perhaps be grantable to a man for life. But it is otherwise of an entry into the land to hunt. This has been assimilated to the case of dignities, and it has been argued, that because a dignity has no connection with the land except the name, therefore every easement which has a closer connection with the land than a dignity has, may be entailed. If so, there is no easement, and scarce any thing that can be named, which cannot be entailed. An annuity cannot be entailed, but it can be limited to a man and his heirs, because it is a profitable thing; but here is no profit, and no instance can be found of any thing being entailed, which is not a matter of *profit. Any thing descendible and entailable is assignable, otherwise it would create a perpetuity, and it would be *quodam modo* a service issuing out of land, and so is void. It has been argued, that though not good for passing an interest in land, it might be good as reserving something out of the land, though Lord Windesor had no estate; but there is no authority that a person having only an equitable interest, who, it is clear, could not reserve a parcel of the land itself, can reserve an interest out of the land. Hunting is capable of two acceptations: it may mean the pursuit of all game; it may mean only pursuing of beasts with a number of dogs; but the question is, in what sense it is used here. The statute Hen. VII., speaking of hunting for pheasants, does not help the defendant; for one may hunt for a pheasant, and though the art of shooting game on the wing was not known at the time when this grant was made, that does not help him, for a grant must be construed strictly, and confined to the modes of *aucupium* then known.

Cur. adv. vult.

On this day, GIBBS, Ch. J. delivered the judgment of the Court:

His Lordship first stated the pleadings, and observed, that the material part of the deed set out, was the exception. The plea in substance is, that the defendant went to shoot pheasants and partridges, under the privilege reserved by this deed. Several objections have been urged against this plea. First, that the reservation is not to persons from whom the estate

moved. To this it is answered, that the deed may operate as a grant; and that although it may not be good as a reservation, yet being sealed with the seal of all the parties, it would operate as a grant to Lord Windesor, and the heirs of his body; and that it was more than an easement, seemed admitted, because it was to himself, his *heirs, and servants. The case has been extremely well argued, and I doubt not but that all the authorities were brought before us. But there is another point in the case, supposing this to have its full operation, whether as a grant or a reservation; whether it extends to shooting, and we think it does not; that the word hunting does not, in its fair acceptation, extend to shooting feathered game. If one were to give leave to another to hunt over his premises, it would not give him the liberty of shooting there; and many would give another liberty of hunting over their premises, who would be extremely annoyed if he went shooting there. Therefore we are of opinion, that the defendant is unjustified by his plea; and that there must be

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Judgment for the plaintiff.†

SOARES AND ANOTHER v. THORNTON.

(7 Taunt. 627—642; S. C. 1 Moore, 373.)

1817.
June 20.

Where the owner of a ship, by his contract, places the entire vessel for a time under the sole control of the freighter, during that time any act of the owner of the vessel, done in fraud of the freighter, is an act of barratry.

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The words "let to freight and hire" are not essential in order to constitute the freighter sole owner for the time.

A covenant by the owner to carry 100 tons for the freighter from P. to O., at 6*l.* per ton, and a covenant by the freighter that the commander might fill up the vessel with any other goods on freight, the commander agreeing that the freighter should have the preference of shipping the other goods: if the freighter fills up the vessel, he becomes complete owner for the time, and a loss by the act of the original owner is a loss by barratry.

THIS was an action of assumpsit on a policy of insurance upon flax, valued at 5,200*l.*, at and from Pernau to Oporto. In all

† See Manw. c. 18, s. 10, "Of the hawking and hunting," p. 136, in 4to signification of these two words edit. Lond. 1615.

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the counts, the interest was averred to be in the plaintiffs. In the first count the loss was averred to be by the barratry of the master. *In the second count, by certain perils, losses, and misfortunes, which came to the hurt, detriment, and damage of the goods. And in the third count, by perils of the seas. At the trial before Burrough, J. at the London sittings after Hilary Term, 1817, the jury found a verdict for the plaintiff, for 500*l.* damages, subject to the opinion of the Court upon the following case. The plaintiffs, on the 20th February, 1816, entered into a sealed charter-party, expressed to be between Jozè de Fontes, commander of the Portuguese brig *Jozè and Maria*, then in the port of London, and the plaintiffs, freighters of the said brig, whereby Fontes covenanted, that the brig being tight, staunch, and substantial, and every way properly fitted, victualled, and manned, as is usual for vessels in merchants' service, and for the voyages thereafter mentioned, should immediately take on board in London, from the freighter, 70 tons of flax, and 5 tons of hemp, and therewith proceed direct to Figueira, and give notice of her arrival to the agents there of the freighter, and deliver the flax and hemp, agreeably to bills of lading, and with all dispatch sail direct to Pernau, and there take on board from the said agents or assigns 100 tons of flax, (together with the other goods thereafter mentioned,) and therewith sail direct to Oporto, and there deliver the whole 100 tons of flax, agreeably to bills of lading, and there end the voyage. And the commander agreed, that the brig should lie at Pernau for the purpose of receiving the 100 tons of flax, twenty running days in the whole, to commence on 10th of April then next, provided the brig should then have arrived at Pernau, and be ready to load on or before that period; otherwise the lay days to commence from the day on which the brig should arrive at Pernau, being ready to load, and notice thereof given: that the vessel should go addressed *to the agents or assigns of the freighter, at her ports of loading and discharge; and the freighter covenanted, at his own costs, to send the 70 tons of flax and 5 tons of hemp alongside the said brig in the port of London, and to send the 100 tons of flax alongside the brig at Pernau, within the day thereafter limited, or days of demu

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rage thereafter granted; and to receive the 100 tons of flax from alongside the brig at Oporto with all dispatch, and to pay for the freight or hire of the brig for the voyage, 2*l.* 10*s.* from London to Figueira, for every ton of flax or hemp there delivered, with 5 per cent. primage, and from Pernau to Oporto, freight at 6*l.* per ton for the flax there delivered, with 5*l.* per cent. primage; that the whole freight and primage from London to Figueira, and from Pernau to Oporto, should be paid as follows: viz. 300*l.* to be advanced previous to the brig sailing from London; but in the event of the loss of the vessel during the voyage, the 300*l.* to be returned, the remainder of the freights and primage to be paid in cash forthwith on the freighter receiving advice of the delivery of the flax at Oporto: provided, and the freighter agreed, that the commander should have liberty, without prejudice to that charter-party, to receive any goods on freight on board the brig at Figueira for Pernau, and there deliver them; for loading such goods, the commander was to be allowed fourteen running days from the brig's arrival at Figueira; and in such event, the commander agreed, that the goods should be delivered at Pernau within eight running days after arrival there; provided further, and agreed, that the said commander might, without prejudice to that charter-party, complete the loading of the brig at Pernau with other goods, on freight, over and above the 100 tons of flax: and in such case the commander agreed, that the agents *or assigns of the freighter at Pernau should have the preference of shipping the other goods, they paying freight for the other goods in proportion to the stipulated rate of freight for the 100 tons of flax; and the commander agreed, that the vessel should not be detained at Pernau any longer time over and above the lay days allowed for loading the 100 tons of flax, than should be necessary for stowing the remainder of her cargo; that the freighter might keep the vessel on demurrage at Pernau fifteen running days over and above the lay days, at 3*l.* per day; and by a memorandum, previous to the execution, it was farther agreed, that the freighter should send the 100 tons of flax alongside the brig at Pernau, the expense to be paid by the freighter, or commander, agreeably to the custom of that port, and that the

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commander should send the 100 tons of flax to the quay of Oporto, at his own expense. Fontes, described in the charter-party as the commander, was in fact also the sole owner of the *Jozè and Maria*; the plaintiff, pursuant to the charter-party, shipped in London the 70 tons of flax, and the 5 tons of hemp, and the vessel, with that cargo, in the beginning of March proceeded to sea under the command of one Gouvea, Fontes remaining in England, and arrived on 26th March at Figueira, whence, after discharging her cargo, she proceeded in ballast to Pernau, where she received on board, on account of the plaintiffs, six hundred and thirty-four bales of flax, which filled her. After lading this cargo, the *Jozè and Maria* sailed for Oporto, and in the course of her voyage put into Deal, in order to repair a leak occasioned by bad weather. While the ship lay at Deal, Fontes the owner came on board, when he proceeded to sea, and took the management of her, and directed her course, and on the 10th October, wilfully run her on shore, Gouvea, the captain, being privy thereto, and concurring therein, and the ship was lost; the cargo was landed on the coast of France, one-half of which was greatly damaged by sea-water. The plaintiff on receiving advice of the arrival of the *Jozè and Maria* at Pernau, effected the policy in question, which the defendant subscribed, for 500*l*. On the 26th October, the plaintiffs received notice of the loss, and on the same day gave notice of abandonment to the defendant. The question for the opinion of the Court was, whether the plaintiff was entitled to recover; if the Court should be of opinion that he was entitled to recover, the verdict was to stand; if not, the verdict was to be set aside and a nonsuit entered.

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[The case having been argued, the Court took time for consideration.]

[638] GIBBS, Ch. J. on this day delivered the judgment of the Court :

This was an action on a policy of insurance on the Portuguese ship *Jozè and Maria*, and the declaration avers a loss by barratry. I confine myself to the loss by barratry, because it is extremely difficult for the plaintiff to recover on any other ground, if he

cannot recover on that. The cause was tried before Burrough, J. in London. Evidence was given of a charter-party of affreightment between Fontes of the one part, and Soares, therein expressed to be the freighter of the said brig, of the other part, which witnessed that for the considerations therein mentioned Fontes covenanted that the said brig being tight and staunch, as is usual for vessels in merchants' service, and for that voyage, should receive and take in seventy tons of flax, and five tons of hemp, sail for the port of Figueira, give notice of arrival, and make true delivery, and with all dispatch sail for Pernau in Russia, where, being arrived, she should immediately give notice to the freighter, and take on board one hundred tons of flax, with other goods, and sail for Oporto, and on arrival give notice, make delivery according to bills of lading, and such delivery being completed, end the said intended voyage. So that by this stipulation, the master covenants, as in the last case, with the freighter, to take certain goods on board, to go to Figueira, thence to Pernau, to take in there one hundred tons of flax, proceed with the cargo to Oporto, *make true delivery there, and so end the voyage. There are stipulations for the freight which it is not, I think, necessary to state, but there is a provision that the commander shall have liberty, without prejudice to this charter-party, to take in goods at Figueira and convey the same to Pernau, which is not an uncommon provision. There is another provision, and the freighter agrees, (for this, it is observable, the commander has the leave of the freighter,) that it shall be lawful for the commander to complete a cargo at Pernau, with other goods to be put on board over and above the said one hundred tons of flax: in other words, if I put one hundred tons only on board your vessel, the commander may fill up the vessel with other goods; but if I, the freighter, choose to fill her up, I am to be at liberty so to do. The case states that the freighter put on board seventy tons of flax, and five tons of hemp, that the ship sailed and arrived at Figueira, discharged her cargo, and sailed in ballast to Pernau, so that it appears that the commander put no goods on board at Figueira. The ship took in at Pernau six hundred and thirty-four bales of flax, which filled her up, so that the commander had no means of putting any goods

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on board. While she was lying at Deal, full of the plaintiff's goods, and no room for any others, the owner of the ship came on board, took the command of her, and Gouvea, the captain, assenting, wilfully ran her ashore, and the goods were lost to the plaintiffs. The material question is, whether this is a loss by barratry, and the objection to the plaintiff's recovery is, that it was the owner of the vessel, who ran her ashore, and by his act occasioned that; which is supposed to be a loss by barratry. Barratry is an act of fraud not directed against the owner of the goods which are lost, but a fraud against the owner of the ship; and, however *innocent may be the owner of the goods, who seeks to recover against the underwriter, yet, if the owner of the ship concurs in the act which caused the loss, it takes from it the character of barratry; for the very definition of barratry is, a fraud by the master and mariners against the owner of the ship. Pursuing this principle, in *Vallejo v. Wheeler*,† an action which was brought to recover for a loss by barratry, wherein it was objected, that as the owner did concur, it could not be barratry, the answer given was, the freighter is, for the time, *pro hac vice*, the owner. You, who have let the ship to freight, are for the time not the owner. If Darwin had in that case concurred, it would have been no barratry, but you, Willes, having parted with the possession of the ship for a time, are not the owner, and your concurrence does not prevent its being barratry. That was the principle of *Vallejo v. Wheeler*,† and it has ever since been recognized as law. In all the other cases which have been decided pursuant to that, the owner of the ship has retained no control over any part of the ship: (the words "let to freight" I pay no regard to.) Here the commander covenants to receive on board goods in London, and to proceed to Figueira, there being no stipulation that any goods should be put on board at Figueira, because the ship-owner thought himself sufficiently recompensed by the freight stipulated for the rest of the voyage: the freighter stipulates that it shall be lawful for the owner to put goods on board at Figueira, and take them to Pernau. This is much like a stipulation by the ship-owner, that he considered the ship let to the freighter, and that

† 1 Cowp. 143.

without this provision in his favour he would have had no right to put on board any goods of his own, and that he must otherwise be content with the freight of such goods as the freighter should put on *board. The same observation applies to the stipulation that the owner might ship goods from Pernau, over and above the one hundred tons, if the freighter did not choose to fill up the vessel. But it is urged that the owner having a right to ship goods on freight on his own account, never divested himself of the government of the ship, and therefore his acts cannot amount to barratry. It is, however, a question, whether the parties have not changed places, and whether the freighter is not to be considered as the owner, and whether the owner has not merely reserved to himself the power to do certain things, notwithstanding the charter-party, and without prejudice to it. That is a fair question to make, but we are to look to a farther state of the circumstances: if the original owner, though he continued owner for some part of the voyage, had ceased to be the owner when the act took place, then this act of his has ceased to have any effect whatsoever. At Pernau the freighter exercised his election to put on board as much merchandize as entirely occupied the ship, and the original owner was thereby precluded from the opportunity of loading any goods on board. However, therefore, the question might have stood, if the act had happened during the period in which it might be doubtful who had the control of the ship, or in which it was divided between them, here the period when the owner might have resumed a right in the ship was passed. The freighter had filled her up at Pernau, and the owner's opportunity was passed; and the freighter had a right to require that she should then proceed, without any control of any other person, except himself, to her place of destination. Then the act of the original owner and master together was a complete act of barratry. If the right of the original owner was then at an end, the right of the freighter must be in existence. *The concurrence of the freighter was then the only thing that would prevent the act of the master from being an act of barratry. The freighter did not concur in this act, this therefore falls within the principle of *Vallejo v. Wheeler*; and though there are some minute circumstances of distinction in this

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case, we are of opinion that they do not take it out of that principle, and that the judgment therefore must be for the plaintiff. We cannot regret the result to which this reasoning has conducted us; for it is a very hard thing, when a person has insured his goods, to find himself exposed to a loss, to which he supposed his indemnity would extend, but in which he is frustrated.

Judgment for the plaintiff.

1817.
June 20.

POPE v. TILLMAN.

(7 Taunt. 642—643; S. C. 1 Moore, 386.)

[642]

A declaration in replevin for taking divers goods and chattels of the plaintiff is bad for uncertainty.

And although judgment pass by default for the plaintiff, the defect is not cured by the statute of jeofails, 4 Ann. c. 16.†

IN replevin, the plaintiff declared, that the defendant, in a “certain dwelling-house, took divers goods and chattels of the plaintiff.” After judgment by default, for the plaintiff, and a writ of inquiry executed, *Lens*, Serjt. in the last Term, obtained a rule *nisi* to arrest the final judgment; against which,

Best, Serjt. now shewed cause :

Neither in the case of *Wiatt v. Essington*,‡ nor in that of *Bertie v. Pickering*,§ which were cited in moving for the rule, was the attention of the Court referred to the statute of Ann. Those cases too are in trespass, wherein it is more necessary to enumerate the goods than in replevin. The objection is now cured by that statute of jeofails,¶ *since the passing whereof it is only necessary to consider whether this is matter of substance or of form. The taking of the plaintiff's goods is the substance, the enumeration of them is merely matter of form. *Boardell v. Parsons*,†† the omission of the venue of a request is matter of form, and cannot be taken advantage of by motion in arrest of judgment, which is bound by the same rules which regulate general demurrers.

[*643]

† 4 & 5 Ann. c. 3, in Rev. St. See now also R. S. C. Ord. xxviii. r. 1.—R. C.

‡ 2 Ld. Raym. 1410.

§ 4 Burr. 2433.

|| 4 Ann. c. 16, ss. 1 and 2 [repealed, 46 & 47 Vict. c. 49, s. 4, but see s. 7].

¶ 4 Ann. c. 16.

†† 10 East. 359.

Lens, in support of his rule, was stopped by the Court.

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GIBBS, Ch. J. :

In case there should be a judgment *pro retorno habendo*, or *capias in withernam*, it is extremely material, that the declaration in replevin should inform the sheriff what are the goods taken. I would not give judgment in this case, without stating, that the Court have not failed to advert to a case in the time of Lord HARDWICKE,† in which it was held that a count for taking *quandam parcellam lintei, et quandam parcellam papyri*, was good; and another case,‡ in which the taking fourteen skimmers and ladles, was held sufficient; but there was something to guide the party: here is nothing whatever to guide the party as to the nature of the goods taken; and it is still more necessary in replevin, than in trespass, and much more so than in trover, that the goods should appear. Upon this declaration, we therefore think, no judgment can be given.

Rule absolute to arrest the judgment.

CRAVEN v. CRAVEN.

(7 Taunt. 644—645; S. C. 1 Moore, 403.)

1817,
June 21.

[644]

The Court will not review an award, on a suggestion that the arbitrator to whom all matters in difference were referred considered only the legal, and rejected the equitable, questions; when the party applying does not state to the Court any equitable case or question which he supposes the arbitrator to have rejected.

In this case, two actions pending between the parties, (who were brothers,) and all other matters in difference, were referred to an arbitrator, who, on the first hearing, apprised the plaintiff, that he had no cause of action; whereon he prayed to be let into an equitable case, which he supposed he had, and attended the arbitrator by an equity counsel, with whose law the arbitrator perfectly agreed; but deeming it wholly irrelevant to the circumstances of the parties, although on account of the near connection

† Cas. temp. Hardw. 124, and Replevin, II.

Kempston v. Nelson, S. C. 6 Bac. Abr.

‡ Bourne v. Mattaire, 2 Str. 1015.

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between them he had submitted to hear the story four times told over, and leaving no question undisposed of, he made his award in favour of the defendant.

Pell, Serjt. had, on a former day, obtained a rule *nisi* to set aside this award, upon an affidavit, which suggested, that the arbitrator had refused to enter into the equitable case of the plaintiff; and although it was a reference of all matters in difference, had confined himself to the mere matter of the two actions; (but this ground was completely disaffirmed by the arbitrator's affidavit, stating to the effect above detailed;) next, that inasmuch as the arbitrator had made his award respecting the two actions only, and not respecting the other matters in difference, which it appeared existed, the award was not final.

Lens, Serjt. in shewing cause, insisted, that inasmuch as the plaintiff did not even now state any equitable ground, or any evidence which he had before offered, on which the arbitrator ought to have decided differently, the Court would not intend that the arbitrator had done wrong.

[645]

GIBBS, Ch. J. :

The questions in this case are, first, whether the award be final; secondly, whether the arbitrator has so conducted himself as to give ground to either party to set aside his award. First, this is a reference of all matters in difference, and the award therefore ought to go to all matters in difference; and the arbitrator so recites in his award, and then he says, "Having considered all the evidence and papers, touching the matters in difference, I award, that the plaintiff has no cause of action"; this, therefore, purporting to be an award concerning the matters in difference, is equivalent to an award on the premises, which, according to my recollection, must be taken to be final, as to all matters referred. Next, whether the arbitrator's conduct requires the award to be reviewed. I agree with the defendant's counsel, that it is not sufficient to put an abstract proposition to an arbitrator, and upon his answer, decline to give evidence, or prefer a claim, and then complain of it, but that he

should tender a specific case, and specific evidence : but I think, on the fair construction of this affidavit of the arbitrator, he has completely answered this charge. It is said, that he refused to entertain an equitable question : he was, however, attended by an equity counsel, and he agreed with him in all his propositions of law, but was not prepared to think them applicable to the present subject ; and he swears that he was determined, on account of the situation of the parties, to reject nothing which could tend to elucidate the question between them.

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r.
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Rule discharged.

DOE, ON DEMISE OF DAUNCEY, v. DAUNCEY.

(7 Taunt. 674—679.)

1817.
June 25.

Concurrent customs in a manor to bar entails of copyhold by recovery, and by surrender, are not inconsistent ; and slight evidence suffices to prove the latter, because it is adverse to the interest of those who make the evidence.

[674]

THIS was an ejectment brought to recover a customary estate. Upon the trial of the cause at the Horsham Spring Assizes, 1817, before *Bosanquet*, Serjt., it appeared that the premises were parcel of the manor of Ditchling, and that on the 1st November, 1723, upon the surrender of P. Martin, John Dauncey, and Ann *his wife were admitted to hold to them, during their lives and the life of the survivor, with remainder to the heirs of their bodies, with remainder to the right heirs of Ann. That they had four sons and two daughters, and died leaving Josiah Dauncey, their youngest son and heir at law, according to the custom of the manor, which was of the nature of Borough-English, who, in 1774, was admitted to hold to him in fee. He surrendered to the use of his will, and devised the premises to the defendant, and died without issue. The plaintiff claimed under the entail of 1723. To prove that the estate tail was not barred by the surrender of Josiah Dauncey, the plaintiff produced in the Court Rolls numerous instances, as many as twenty, of recoveries suffered to bar estates tail ; there was one instance of a simple surrender of a tenant in tail, in 1806. After his

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v.
DAUNCEY.

decease there was a presentment of it, and that W. Elliott was admitted to the reversion. The steward's fees on recoveries were more considerable than on surrenders. For the defendant were cited, *Roe*, on the demise of *Bennett*, v. *Jeffery*,† *Everall* v. *Smalley*,‡ *Erish* v. *Rives*.§ A strong address was made to the jury by the plaintiff's counsel, on the improbability of a custom to bar estates tail by a mere surrender. *Bosanquet*, Serjt., stated to the jury, that the bar by surrender was the cheapest mode, the most for the interest of the copyholders, and the least for the interest of the steward; and the circumstance of its being admitted on the rolls by the steward that there was an estate tail barred by surrender, was therefore strong evidence of the existence of the custom; he stated that he thought that the custom to bar estates tail by surrender was proved, not as a conclusion of law, but of fact. He directed them, that he thought, in point of law, they *were at liberty to find this custom, and he advised them so to do, and they so found.

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Vaughan, Serjt. in Easter Term moved for a new trial :

He admitted that there might be concurrent customs in a manor, the one to bar estates tail by a recovery, the other to bar them by surrender; but the evidence shewed that the ordinary mode of barring entails in this manor was by recovery and not by surrender. The instance of the surrender in 1806 was by a tenant in tail, who was also reversioner in fee, so that he had a right to surrender his entail.

(CURIA, *contra* : He had a right to surrender his life-estate, and to surrender his reversion in fee : he could not surrender his estate tail without a custom.)

In the case of *Roe* on demise of *Bennett* v. *Jeffery*, on which the learned Judge much relied, there was an acquiescence of fourteen years: here the surrenderer was still alive, and no one could dispute the possession. In that case, *DAMPIER*, J., while he admits that a single instance is evidence to prove a custom, holds

† 14 R. R. 597 (2 M. & S. 92).

§ Cro. El. 717.

‡ 1 Wils. 26, Str. 1198.

that if frequent instances of barring by recovery had been proved, which he says is inconsistent with the mode by surrender, there would have been weight in the argument: too much stress was laid on the evidence as proving the custom.

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DAUNCEY.

The Court granted a rule *nisi*.

Lens and *Pell*, Serjts. in this Term shewed cause against the rule:

Unless the evidence were so defective as not to justify a jury on their finding, or unless the law laid down by the learned Judge were wrong, this rule must be discharged.

(The Court directed them to confine themselves to the latter point.)

The learned Judge only left the case to the jury with a strong impression of his opinion as to the fact. An opinion which was justified by the evidence; for the custom is adverse to *the interest of the steward, and therefore it is very strong evidence against him, that he has put on the rolls a bar of an entail by surrender. It only is a question, whether this one last instance, in the opinion of the jury, outweighs the former and contrary instances. In the case of *Roe*, dem. *Bennett v. Jeffery*, HEATH, J. thought it so strictly a question of law, that he so ruled it; but here the learned Judge considered this only as a question of fact with a strong recommendation. And it is no inconsistency that the two modes of barring entails should be concurrent. If a new trial is granted, the case must again be left to the jury with a similar direction. Since the case of *Everall v. Smalley*, a case came from the Midland circuit in which *Clarke* and *Vaughan* were of counsel, wherein it was held that a single instance might be evidence of a descent according to the nature of Borough-English. This mode of bar by surrender ought to be favoured, on the principle laid down in *Strange*,† that it is the most natural, and the cheapest.

[*677]

Vaughan was called on by the Court, to support his rule:

Here the time had not arrived in which it became the interest

† *Everall v. Smalley*, Str. 1198.

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of any person to contest the validity of this course. Josiah Dauncey's surrender, which is to affect the plaintiff, is of 1774. The surrender sought to be given in evidence is of 1806, to bar an entail of 1723. This is an *ex post facto* custom. The question is not, whether there were a custom in 1806, but whether such custom subsisted in 1774, of which there is no evidence. Here is clear evidence of a custom to bar entails by recovery. There are but three modes in which it can be done; first, by forfeiture and re-grant; secondly, by recovery; thirdly, by surrender. If there be no custom to surrender, it may be done by recovery *without a custom. It was determined in *Everall v. Smalley*, and *Doe*, on Demise of *Wightwick*, v. *Truby*,† that it may be done in both ways; and in Lord Hardwicke's time, *Carr*, on Demise of *Dagwall*, v. *Singer*,‡ by three Judges, BIRCH, BURNETT, and ABNEY, WILLES, Ch. J. *dissentiente*. If those who are most interested acquiesce, it furnishes a strong inference of enjoyment. The judgment of the Court in *Roe v. Jeffery* is different from this: there had been, as Lord ELLENBOROUGH, Ch. J. expresses it, thirteen years' unresisted enjoyment. The steward would be compelled to receive this surrender, he could not resist it, and the surrender in the single instance is received by the deputy steward, not by the steward himself. This was mixed matter of law and fact, and the jury have been restrained and fettered by the very strong terms in which the learned Judge directed them.

GIBBS, Ch. J. :

The doctrine held in the cases of *Doe v. Truby*, and *Carr*, d. *Dagwell*, v. *Singer*, is, not that it is necessary to have a custom, to bar an entail by surrender, but that if no custom for barring it by recovery or any other mode be proved, a surrender will be sufficient to bar an entail, without a custom. We think that some points may arise in this case, which have not been fully adverted to, perhaps from its having been argued only on one side at the trial. I certainly agree with most of the doctrine laid down by my brother BOSANQUET at the trial: I agree with him, following HEATH, J., that a surrender is the cheapest and most natural

† 2 Bl. Rep. 544.

‡ 2 Ves. Sen. 604.

mode. I agree with him that there may be concurrent customs: I agree that the tendency of human nature is such, that an ignorant tenant, coming to a steward, would be most naturally directed to suffer a recovery. The question here, is not, whether a custom to bar entails by surrender exists adversely to the other, but whether *both do not exist. I think this instance is strong evidence, because the taking of this very surrender occurring but a few years ago, done with the very intent of barring an entail, with the knowledge and acquiescence of him who was most interested in promoting the custom to bar by recovery, strongly sanctions this attempt to bar by surrender. I do not think I should have much differed from my brother BOSANQUET in his directions to the jury on this point; but there are several other points which appear not to have been sufficiently considered, and we must defer our judgment.

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[*679]

Cur. adv. vult.

GIBBS, Ch. J. now delivered the judgment of the Court:

We think it better to say nothing on the facts of this case, and the bearings of the evidence, that our opinion may not prejudice the cause. If I were to try the cause, I should probably direct the jury nearly as my brother BOSANQUET did, but there are reasons in the case, that make us think it desirable to submit the cause to a farther enquiry.

Rule absolute.

HOPPER AND WIFE v. REEVE.

(7 Taunt. 698—700; S.C. 1 Moore, 407.)

1817.
June 23.

[698]

It is a direct trespass to injure the person of another by driving a carriage against the carriage wherein such person is sitting, although the last-mentioned carriage be not the property nor in the possession of the person injured.

THE plaintiff declared that the defendant, with force and arms, at Portsmouth, drove a certain gig against a certain carriage in which the plaintiff's wife was then riding, and overturned it, and greatly hurt the plaintiff's wife. After verdict for the plaintiff taken at the Winchester Lent Assizes, 1817, before Abbott, J., *Pell*, Serjt. in Easter Term, 1817, moved in arrest of judgment,

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upon the ground that this ought not to have been an action of trespass, but an action on the case, for that the declaration did not state that the carriage in which the plaintiff's wife was riding, was the carriage of the plaintiff, nor averred any injury to the carriage, but was solely brought for an injury to the wife. Though that injury received by the plaintiff's wife arose out of an act of the defendant, yet it was in consequence of the defendant having run against the carriage of some other person, for such it must be intended to be, not being stated to be the carriage of the plaintiff, and no act could be more consequential in its nature, than this injury to the *plaintiff's wife. The case of *Scott v. Shepherd*† went beyond the law, but not so far as this. The Court granted a rule *nisi*.

Lens, Serjt. in this Term shewed cause :

After verdict, it must be intended that the carriage was proved at the trial to be the plaintiff's carriage, if that be necessary to the maintenance of the action of trespass. If this carriage was in the possession of the wife, it was for the time in the possession of the husband, and though it might have been ground of special demurrer, it is not a ground of general demurrer. If it were stated that she was sitting in the chaise of a stranger, it would have appeared on the evidence that it could not have been in the possession of the plaintiff, and the objection, if any objection it be, would have arisen. But this being in arrest of judgment, it must be taken *primâ facie* that the act was, as averred, done with force and violence. If the plaintiff had declared in case, it would have been necessary to shew that the chaise was in the possession of a third person, not in the possession of the plaintiff, in which last circumstances trespass only, and not case would be proper.

Pell, in support of his rule :

The objection is, that the grievance complained of warrants case but not trespass, for the hurt to the woman was consequential on an act of hurt to another person's carriage, *Pitts v. Gaince and Foresight*.‡ The plaintiff might have declared on

† 2 W. Bl. 892; S. C. 3 Wils. 403.

‡ Str. 635; 2 Ld. Raym. 1402.

his possession of this carriage, and in that case, he might have declared in trespass. *Reynolds v. Clarke*.† The driving against the carriage, was, so far as appears on this record, no trespass to the plaintiff. *The distinction is, that where the injury is immediate, the remedy is trespass, where it is consequential, there the proper remedy is case. It appears that this plaintiff had no interest in the carriage, and the damage was therefore consequential, *Leame v. Bray*.‡

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GIBBS, Ch. J. :

I do not think I could point out any defect in the legal argument of either of the counsel, but the facts are not brought within the law stated by the defendant's counsel ; for I am of opinion that he who throws over a chair or a carriage in which another person is sitting, commits a direct trespass against the person of him who is sitting in that carriage or chair, and that the action of trespass may be well maintained for it.

Rule discharged.

WEBB AND ANOTHER v. ASPINALL.§

(7 Taunt. 701—703; S.C. 1 Moore, 428.)

1817.
June 25.

A *cognovit* given after process sued out, and before declaration is good.

[701]

The rule requiring the presence of an attorney for the defendant upon the giving of a warrant of attorney by a defendant in custody, extends to *cognovits*.

BEST, Serjt. had on a former day obtained a rule *nisi* to set aside a judgment, and a *cognovit*, (for the debt and costs of the arrest,) on which it had been entered up, on two grounds ; first, that the *cognovit* being given immediately after the arrest, and before declaration, was void ; for, at the time when the defendant acknowledged the plaintiff's cause of action, the plaintiff had not stated on record any cause of action ; secondly, that the defendant had given this *cognovit* while he was in the custody of the officer, and that no attorney for the defendant was present

† 1 Ld. Raym. 558.

§ See now 32 & 33 Vict. c. 62, ss.

‡ 3 East, 593. [See Preface to 7 R. R. vii.]

24, 25, and *Paul v. Cleaver*, 11 R. R. 608, and notes there.—R. C.

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 [*702]

when he signed the instrument ; for that the rule of,† Court *requiring an attorney for the defendant to be present, when he, being in custody, executes a warrant of attorney to confess judgment, by equity of construction also extends to the case of a *cognovit* given by a prisoner, although the rule makes no express mention of *cognovits*.

Vaughan, Serjt. on this day shewed cause, upon affidavits that when the defendant signed the *cognovit*, he came to the plaintiff's house, unattended by any officer, and that he did not state, nor did the plaintiff know, that he was in custody in this or any other action. *Vaughan* contended, that in point of law the defendant certainly was not then in custody ; for the sheriff, in permitting him to come alone to the plaintiff, had been guilty of permitting an escape ; and, therefore, the case was not within the rule.

GIBBS, Ch. J. :

I very well know, that an opinion has prevailed that a *cognovit* cannot be taken until after declaration : but I learn from the officers of this Court, that it has been the constant practice to take *cognovits* before declaration ; and that judgments have been entered upon these *cognovits* ; and, therefore, though I know that a contrary opinion has been cherished by certain persons, I am of opinion that the judgment is regular. The next question is, whether the *cognovit* is void, within the rule which requires that every warrant of attorney is to be executed in the presence of an attorney for the defendant, if he be in custody, and that for default of this observance it shall be void. Here it is sworn by the defendant, that he was arrested, and went to the plaintiff, and Webb, the plaintiff's attorney, to whom he gave a *cognovit* for a sum, which included 15*l.* debt, and the costs of the writ.

[*703]

The plaintiff answers this, by saying, that when *the defendant came to the plaintiff, he, the defendant was alone, and did not state to the plaintiff, that he was in custody in this, or any other cause ; and that he, the plaintiff, did not know or believe that the defendant was in custody in this or any other cause. It

† Hil. T. 14 and 15 Car. II. 1662.

is very remarkable how the plaintiff, Webb, swears this: he does not state how, or under what circumstances, the application was made to the defendant for this *cognovit*; but this I know, he had sued out bailable process against the defendant, and had directed his attorney to arrest him, and had made him give a security for the costs of the arrest. Did he then believe that the defendant had not been arrested when he received the costs of the arrest? Whatever his idea of the meaning of the word knowledge may be, I think he could not but be assured how the facts were. This, therefore, we think, comes within the rule that a *cognovit*, given by a defendant in custody, must be executed in presence of his attorney; and that it therefore is void, and the rule for setting aside this judgment with costs must be made†

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v.
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Absolute.

† ARNOLD v. LOWE.

Best, Serjt. shewed cause against a rule which had been obtained by *Vaughan*, Serjt. for setting aside a *cognovit*, on the ground that it was given by a defendant in custody, and that no attorney for the defendant was present at the execution. In support of the rule was cited the

case of *Paul v. Cleaver*,‡ as deciding that a *cognovit* comes within the same rule of Court, which requires that on the execution of a warrant of attorney by the defendant in custody, an attorney must be present. The COURT made the

1817.
—
June 21.

Rule absolute.

‡ 11 R. R. 608 (2 Taunt. 360).

EXCH. MICHAELMAS TERM.

1817.
Jan. 16.

THE KING *v.* BICKLEY AND OTHERS.

(3 Price, 454—464.)

[454]

The inquisition to find debts, &c. on an extent, is not wholly an *ex parte* proceeding; and a claimant of property in the goods enquired of, may assert his claim before the sheriff, and put material questions to witnesses examined by him on the part of the prosecutor, in the way of cross-examination, to shew that the goods belong to him. And if the sheriff refuse to permit such interrogatories to be put, the Court will set aside the extent and inquisition.

Quære, whether a claimant is entitled to bring forward other evidence in support of his claim.

THIS was a motion to set aside an extent, as to certain property which had been seized under it, on the ground that the sheriff, on taking the inquisition to find what goods, &c. the defendants were possessed of at the time of the extent, had in the schedule thereto returned the property in question as of the goods of the defendants; and had refused to receive, on the occasion of that enquiry, certain evidence offered, to shew that they were not their property but belonged to the claimants on whose behalf the motion was made; and that he had refused to put to the defendants, on their examination, certain questions proposed on part of the claimants with the same view.

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The extent was issued against the defendants, who were merchants at Bristol, at the instance of Brown & Co., bankers at Bath; and by the inquisition taken thereon, the jury had found that the defendants were possessed of 226 hogsheads of sugar, which were then seized by the sheriff. On that inquisition the claimants, Maze & Co., merchants at Bristol, attended by counsel, for the purpose of shewing that the sugars were in fact their property, setting up a title under the bills of lading, which were endorsed to them, against the *prima facie* right of the defendants, who were the consignees. But the sheriff refused to permit the bills of lading to be laid before the jury, or any questions to be put to the defendants as to the property.

Copley, Serjt. obtained a rule last Term, calling on the prosecutors of the extent, and the sheriff of Bristol, to shew cause why the writ of extent and inquisition should not be set aside as to the seizure of the sugar, on an affidavit made by Maze, which stated, that considerably before the issuing of the extent, the defendants had indorsed the bills of lading of those sugars which had arrived in the port of Bristol, consigned to them from Trinidad, jointly to the claimants, for a valuable consideration; and that the sugars had been accordingly thereupon discharged from the vessel into the warehouse of a cooper, appointed by the deponent and his partners to receive the same, in their names; and that they had in fact never been in the possession of the defendants, the Bickleys and Wilcox:—that on the taking of the inquisition, *the prosecutors of the extent attended by counsel, and proved, generally, by the evidence of the defendant Wilcox, that the sugars had been consigned to them the defendants, which was the only evidence produced of any interest or property of them therein:—that the said bills of lading, so indorsed to Maze and Ricketts, were tendered in evidence by their counsel, who, at the same time, proposed to the defendant Wilcox the following question: “Were the sugars, specified in these bills of lading, ever in the possession of the defendants, and are they the property of the indorsees, Henry Ricketts & Co. and Peter Maze?” but that the under-sheriff would not allow the said question to be put, or the said bills of lading to be given in evidence;—and that he also refused to hear the deponent’s counsel on the merits, or to receive any evidence in support of the said indorsee’s title to the property of the said sugars; and that thereupon the said under-sheriff directed the jury to find a verdict for the Crown in respect of the same, which they accordingly did.

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BICKLEY.

[*456

On those facts it was contended that the inquisition was irregular, and they cited the case of the *King v. Bulley and Blommart*,† as an authority, shewing that a stranger claimant, had a right to attend on such occasions to assert his claim, and support it by evidence, to rescue his property from seizure, and

† Bunb. 233.

THE KING
v.
BICKLEY. obviate the mischief of such a proceeding, without the expense and delay of a traverse.

Dec. 19.

[457]

Dauncey, and *Nolan*, now shewed cause. They urged that an inquisition was altogether an *ex parte* proceeding, as appeared from the constant and uniform practice in such cases, and one of which no notice to the party to be affected by it was necessary to be given, *Lilly's Pr. Reg.* 630 :—that the claimant might traverse the inquisition, and that that was the proper and only course of proceeding in such a case ; or he might try his right by bringing an action against the sheriff for wrongfully seizing the goods. On the other hand, they submitted, that if the evidence which had been proposed was to be received by the sheriff on such occasions, and the jury should find against the Crown, the latter had no remedy, since no other writ could issue.

That the practice had always been, to consider the proceeding by inquisition as an *ex parte* proceeding entirely, and therefore such counter evidence had always been excluded, a practice now too long established to be overthrown by a single case of doubtful authority to the contrary, (*Rex v. Bulley and Blomart*) ; some of the principal grounds of which decision no longer existed now, for it was no longer required that security should be given before plea : nor was it true, that the party has no remedy if aggrieved by the return. And they observed, that the minute book had been searched, and though the order for quashing the inquisition was found, yet that the ground upon which it proceeded did not appear.

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Copley, Serjt. and *Gifford*, in support of the *rule, contended, —that from the terms of the mandatory part of the writ,—from the tenor of the language of all the various statutes by which inquisitions are directed to be publicly taken, in all of which the sheriff is directed to hear witnesses ;—and from the very object and manner of taking it, the inquisition clearly could not be considered an *ex parte* proceeding. They adverted to the words of the writ, and to the statutes, particularly the 1 Hen. VIII. cap. 8,† which, by section 2, enacts, “ that every escheator or

† Repealed, 50 & 51 Vict. c. 53.

commissioner shall sit in open or convenient places, according to the statutes heretofore made; and the said escheators and commissioners shall suffer every person to give evidence openly in their presence:" and submitted, that all tended to shew that it was the duty of the sheriff so to proceed in enquiry, as should conduce to the development of the truth of the matters to be enquired of, without regard to the single inconclusive object of fixing a *primâ facie* title in the debtor, merely to be farther agitated by ulterior proceedings; and if an effectual investigation may be had in the first instance, it would be hard to preclude a party interested from the advantages of it. Nor could the Crown be damnified, for a re-investigation might at any time be set on foot by the writ of *melius inquirendo*,† in case the jury should have come to a wrong conclusion, (citing *Ex parte Duplessis*).‡ In the case of *Doe d. Hayne v. Redfern*,§ the witnesses for the Crown *were cross-examined, and other witnesses adduced, by the party who was to be affected by the inquisition.

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As to the argument drawn from the practice, they contended that that proved nothing, since though it might not have been usual to offer such evidence, yet no case could be produced in which such evidence had been offered and rejected, and such rejection approved by the Court. But the case of *Rex v. Bulley & Blommart* (they insisted) was decisive on the point, and there was nothing in the books to impeach that case, which appeared to have been much considered, and is reported with unusual minuteness and circumstance, (and it was confirmed (they observed) by a book of MS. notes || on the subject of extents, which was tendered by them to the consideration of the Court), and there the right of a claimant to examine witnesses was clearly established by the authority of the opinion of the Court, and that notwithstanding former practice.

If it were not permitted to a party who claimed property seized under an extent, to produce witnesses to prove his property in them, it would be unjust and hard in the extreme.

† Fitz. Nat. Brev. 255 (p. 572).

‡ 2 Ves. Sen. 538—542.

§ 11 R. R. 329 (12 East, 96).

|| The book, said to have been

commended by the Court in the case of the *King v. Bebb*, Hughes's Rep. p. 53.

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[*460]

Suppose the defendant to be in possession of lands, as tenant at will, or from year to year, and the prosecutor of the extent, to prove that he was in possession of these lands, which would be *primâ facie* evidence of seisin in fee, could it be contended that it would not be *competent to the landlord to prove that the defendant held the lands merely as his tenant? The question is in fact, not whether a claimant may produce witnesses of his own to the sheriff to be examined on his behalf, but, whether a witness already under examination may not be cross-examined;—whether such a witness must tell all he knows, as if a book, or other documentary evidence were produced, and the sheriff should admit a part of it and refuse to receive the rest.

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Dauncey, in reply, distinguished the case of *The King v. Bulley* from the present, by the circumstance in proof, and much relied on there, of the sheriff having been guilty of shuffling and evasion, and other gross misconduct and wilful partiality, in procuring the inquisition to be taken clandestinely; whereas no such thing had been suggested in this case, where the sheriff's conduct was not in other respects complained of. He admitted that a claimant had a right to be present at the holding of such an inquisition, and that it ought to be open, but contended that he had no right to interfere, either by examining witnesses himself, or cross-examining those produced by the prosecutor, which would necessarily be productive of the utmost confusion; as, if any one should be entitled to do so, there could be no limit to the discussions which might be set on foot by any number of claimants, perhaps to the total hinderance of the taking the inquisition, and that was the reason why such a proceeding was altogether *ex parte*. And he ultimately submitted, that if it had been permitted, as stated *in the case in *Bunbury*, the subsequent constant uniform usage shewed that that practice had been since altered.

Cur. adv. vult.

THOMPSON, Chief Baron, now delivered judgment: (Having stated the case, his Lordship proceeded.)

The inquisition has returned certain sugars to be the property of the person against whom the extent in aid was sued out.

The application made is to set aside this inquisition, upon the ground of the sheriff having misconducted himself, in refusing to receive the evidence to shew that these sugars were the property of a person of the name of Maze, who attended upon the execution of this inquisition. The affidavit states, that the sugars were imported by a ship called the *Suffolk*, from the island of Trinidad; and that a considerable time before the issuing of the extent, the defendants had endorsed the bills of lading to the deponent (that is, Maze) and his partners, Messrs. Ricketts, jointly and severally, for a valuable consideration; and that the last-mentioned sugars were accordingly thereupon discharged from the vessel into the warehouse of the cooper, appointed by the deponent and Messrs. Ricketts & Co., to receive the same in the names of the indorsers, and have in fact never been in the possession of the defendants. And he farther states, that by virtue of this extent, an inquisition was taken on the 26th of October, before the under-sheriff, at which the deponent, on behalf of himself *and his partners, Messrs. Ricketts & Co. attended by himself and his counsel; and Messrs. Brown & Co. also attended in like manner; and that it was proved by the evidence of the defendant Michael Willcox, that the said sugars were consigned to them the defendants, which was the only evidence produced of any property of the defendants in the sugars, it not appearing for whose interest, but merely that they were consigned to them. And the deponent also states, that the bills of lading, so indorsed to him and the said Messrs. Ricketts & Co., were tendered in evidence by their counsel, who at the same time proposed (and this was tendering evidence) on the cross-examination of the witness produced on the other side, to the defendant Willcox the following question, upon the inspection of these bills of lading, in the nature of cross-examination,—“ Were the sugars, specified in these bills of lading, ever in the possession of the defendants, and are they the property of the indorsers, Henry Ricketts & Co., and Peter Maze?” It certainly seemed a very material question for the witness to have answered, but the affidavit states that the under-sheriff would not allow the question to be put, or the bills of lading to be given in evidence in any way.

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The question here is really upon this point, and it may be decided upon this point simply: that here the evidence of the cross-examination of a witness on the other side was refused, upon a question in what light the goods were consigned, and whether the consignees ever had possession of them? The *bills of lading were produced to shew that these were the same sugars, but the question was, "Were they ever in the possession of the defendants?" and the sheriff would not allow that to be put.

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It is not, I believe, very usual, in point of practice, to have these inquisitions, which are stated to be *ex parte* proceedings, much attended to; but there is no reason why the parties may not attend them, and why they ought not to be allowed to propound all such questions to the witnesses as may be deemed necessary to prove the property in others than the defendant. And the case of *The King v. Bulley and Blommart*, which was much relied on, is of great weight: indeed it is directly in point; but it is one which I never heard of (so little has it ever been acted upon,) till it was cited upon this occasion. There, the Court held, that a witness should be examined to prove the property; it does not appear there that there was any refusal to cross-examine the witnesses; but here, there is the additional circumstance, that the cross-examination was refused. It was laid down that the writ of extent was a right in the King, not at common law, but given by the statute of Henry VIII.; and the learned person who stated that, said, that he himself had attended inquisitions on elegits and outlawries. Undoubtedly, this is a very strong authority, and it seems to have with it all the reason of the thing; for, as it was stated in the argument, had this case been then entered into, the expense and trouble of traversing the inquisition would have been avoided. And it seems to be no answer that you may plead the *claim; for meanwhile, irreparable injury may be done, when, if the evidence had been suffered to proceed, and had the questions proposed been allowed to be received, it would have shewn the truth of the matter. It seems to us, therefore, that this is an irregular proceeding, and the inquisition must, for that reason, be quashed. It will not, however, I take it, preclude the taking another

inquisition on a new writ of extent of the teste of the one now quashed.

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GRAHAM, Baron :

I agree with the LORD CHIEF BARON, that the sheriff did wrong in not either propounding the question, or suffering it to be put; but I do not adopt the case in Bunbury, however high the authority may be, as deciding the other point.

THOMPSON, Chief Baron :

There is quite enough here without that.

Per CURIAM :

Rule absolute.

EXCH. HILARY TERM.

THE KING, IN AID OF REED AND OTHERS, v.
HOPPER AND OTHERS, ASSIGNEES OF MOWBRAY
& CO.

1817.
Feb. 1.

[495]

(3 Price, 495—520.)

A deed of bargain and sale, enrolled under the statute, held to have been rightly enrolled as of the day when it was brought into the Inrolment Office, although delivered to a porter in attendance there after office hours, and not minuted by the clerk, or in fact received by him, till two days afterwards.

The endorsement by the clerk of the enrolments of the day of the enrolment, by way of date, is a part of the record, and cannot be averred against; nor is evidence admissible to show that it was in fact enrolled on some other day; and that although the date be written on an erasure.

THE defendants having put in a claim to the property seized under this extent in aid, as assignees of the bankrupts, had pleaded, that Mowbray & Co. being traders, had become bankrupt, and that afterwards, and before the issuing of the writ of extent, and before the 24th of July (the teste thereof), to wit, on the 22nd July, the commissioners did bargain and sell, &c. the effects, &c. of the said bankrupts, to Henry Page, the provisional assignee; which said indenture of bargain and sale was before,

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&c. (on said 22nd July,) in due manner enrolled in his Majesty's High Court of Chancery. Without this, that certain of the bankrupt partners were on the 24th July seised and possessed of the several freehold and leasehold estates mentioned in the schedule annexed to the inquisition as therein supposed; wherefore they prayed judgment and restoration. Replication taking issue.

[496]

There were, therefore, three issues to be tried: 1st, Whether the bankrupts were seised and possessed of the freehold and leasehold premises mentioned in the schedule: 2ndly, Whether the firm had become bankrupt: 3rdly, Whether the commissioners had, by bargain and sale, duly enrolled on the 22nd July, before the teste of extent, bargained and sold to Page the provisional assignee.

On the trial before Mr. Baron Richards, at the sittings after Easter, 1816, a verdict was given for the defendants, absolutely, on the second issue, subject to the opinion of the Court on the first and third; and that depended on whether a certain deed of assignment had been, in point of law, enrolled, or not, on the day on which it had been brought to the office.

A rule was consequently granted in the following Trinity Term, calling on the prosecutors of the extent, to shew cause why a verdict should not be entered accordingly for the defendants on those issues.

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Mr. Baron RICHARDS now read his report of the evidence given on the trial, from which it appeared in substance, to have been proved,—that the deed of bargain and sale was taken to the Enrolment Office for the purpose of being enrolled, on Saturday the 22nd of July, after the appointed office-hours (from ten till three) and delivered to the porter; that it was the custom of the office, for the porter (who was entrusted with the key for that purpose) so to *receive such deeds after the clerks had left the office, who was paid a fee of one shilling with every such deed delivered to him; that whenever a deed was so left, it was the course to make a minute of the day, which was afterwards made the date of the enrolment, but such minute is not made by the porter at the time it comes in, but after-

wards by the clerk ; that if search had been made at the office for the deed, on Saturday evening or Monday morning, before the arrival of the clerk, it would have been forthcoming for inspection ; that the deeds are not usually in fact enrolled, nor the certificate of enrolment made out, till several days after the deeds come into the office.

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It had happened in the present case, that the clerk, on coming to the office on Monday morning (the 24th), finding the deed on his desk, had entered it in his minute-book as having been brought in on the 24th, and it was afterwards enrolled as of the 24th ; but discovering the mistake on being informed by the porter that it had been brought in on Saturday the 22nd, he altered it to the 22nd, accordingly, by erasing the "4th" and writing the "2nd." The certificate was not written till some days after the 24th, and the clerk had altered the certificate which he had made originally, purporting that the deed had been enrolled on the 24th, to the 22nd, in the same manner. It was also proved, that on the deed being delivered to the porter by the clerk of the solicitors to the commission, the porter, in his presence, opened the door of the office, and took it in and laid it on the *desk of the clerk of the enrolments according to his usual practice.

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Dauncey, Walton, and Littledale, now shewed cause. They contended that what had been done on the 22nd could not be considered as an enrolment of the deed in question under the Act, nor as being tantamount to it ; that some authentic minute, at least, should have been made of the deed having been brought in by some responsible person having authority to do so : that the act of enrolment was a solemnity requiring every due formality to be observed in order to render it complete and availing : that the mere carrying a deed to the office and delivering it to a porter there, could not be regarded as an enrolment under the statute, or the object of it would be often defeated. Every enrolment was required to be on parchment. Com. Dig. Bargain and Sale, B. 6. 2 Inst. 673. Lill. Pr. Reg. p. 89, (b) C. They submitted also that as it was in evidence, that there were well-known hours appointed for attendance at

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the office, for the purpose of business, it was the duty of persons interested in the enrolment of deeds to bring them, during those hours, and if necessary to see that they were actually enrolled, or at least, minuted, or that something were done which might be considered a beginning to enrol, and that if they did not they must be content to lose the benefit of it.

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They further contended that if what had been done on the 22nd was not a due enrolment, the Crown was not concluded by the certificate of the date of the *present enrolment, but were entitled to go into evidence of the circumstances, to shew notwithstanding the indorsement by the officer, that the deed had been enrolled on the 24th in fact, and not on the 22nd, and that it had been originally certified as having been enrolled on the 24th of July; for that as the date, at least, was no part of the record, it might be averred against, and proof would be admissible, that the alleged day of the date was not the true one; that this was not a judicial record, but merely ministerial, and ought not to be held to be conclusive as against those who might be interested in falsifying it; that the object of recording the existence of the deed was not such a one as necessarily precluded all right to question the time of the enrolment, which they submitted was no part of the record itself as forming the date: and that they illustrated by the fact of its being pleaded as matter *in pais*, which they insisted was an admission by the other side, that it was not a conclusive record, for in that case it must have been pleaded with a *prout patet*; or it would be ground of motion in arrest of judgment; the only fact on record being that the deed had been enrolled. So in *Hynde's case*,† the Court held that the time of an enrolment shall be tried *per pais*, Lill. Pr. Reg. p. 89, (b) H. And to the same point they cited *Holland v. Downe*,‡ where the whole question at issue was the time of the enrolment. In Buller's *Nisi Prius*, 6 edit. p. 229,

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it is said a fine to be proved with proclamations *must be examined with the roll, because the chirographer is not appointed by the statutes to copy the proclamations, and therefore his indorsement on the back of the fine is not binding. So here the clerk is not appointed or authorized by the statutes to indorse

† 4 Co. Rep. 72.

‡ Sav. Rep. 91.

the deed with the time of the enrolment, and therefore it is not conclusive. Before the 16 Eliz. the date of the enrolment was never inserted, and there is no statute requiring that a date should appear. If inserted, therefore, it cannot, since that Act, be considered as in fact any part of the record, and whatever weight the circumstance of the date might have with the jury, it is at least a matter entirely for them. In the *Duke of Somerset's* case, in Dyer,† a reporter of high authority, it is said to have been held that a depositing a deed for enrolment in a chest in court, which was not afterwards actually enrolled, was not effectual, and whatever doubt the marginal notes may have thrown on that case, it is still in point to shew that at least such was the opinion of Dyer. They submitted (on a suggestion of Mr. Baron GRAHAM,) that in cases where the question was whether a deed had been enrolled within six months after date or not, if the certificate should be held to be conclusive of that, it must be as was said in *Worsley v. Filisker*,‡ because the date was made parcel of the record by the operation of the statute. If, however, on the other hand, the indorsement should be held to be part of the record, and that, therefore, it could not be averred against; *then they submitted that it ought not to have been altered from what it originally recorded, as the day on which the deed had been enrolled, and certainly not by the clerk without the authority of the Court, whose minister he was. It might (they suggested) have been seen on inspection in the office before the alteration had been made, when it would have appeared to have been enrolled (as it was originally minuted), of the 24th, and the most mischievous consequences might have ensued from such an accident, if it were permitted to a clerk to alter the date at any distance of time after it had been recorded. If his minute of the date of the enrolment were to be regarded as part of the record of the fact of the deed having been enrolled, the Crown, or any other creditor, might have seized before the alteration were made, when the record would have justified the seizure; yet the same record, if permitted to be altered, would support any action brought afterwards for the trespass.

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‡ 2 Roll. Rep. 119.

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Therefore they contended on the whole, that the present deed had not been duly enrolled at all; or that if it had, it was only effectually enrolled on the 24th; that it having been once recorded as enrolled of that day it could not be altered to any other day without leave of the Court; and that the day of the enrolment, as expressed in the certificate, being no part of the record, they might be allowed to give evidence against the truth of the endorsement, to shew the true day on which the deed had been in fact enrolled.

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And they suggested, that if such alterations were allowable, they would admit all the mischief of practical collusion on the part of the porter and the persons interested.

Scarlett and Hullock, Serjt., in support of the rule, contended, that the deed of bargain and sale must be considered as inrolled from the time when the deed was first carried to the office; for that the person bringing it in had no power to compel the clerk to inrol it immediately, and therefore was not bound to see the deed actually inrolled; he had done all in his power to that end, and was entitled to any benefit resulting to him from the act—that it was not necessary to see the deed enrolled, or even minuted; and the thing itself, besides, would most frequently be impossible—that the porter, who was entrusted by the clerk with the key of the office, for the express purpose of receiving deeds for enrolment after what were called office hours, represented the clerk himself, and therefore, a delivery to him was the same thing in effect as a delivery to the superior officer; nor was any authority cited to shew that such an act was not at least tantamount to an inrolment. As to its being necessary that it should have been begun at least to be enrolled, it is not the practice in any case to do so; and even judgments are never actually recorded till after execution has been sued out on them, unless from some special purpose.

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The next question that arises is, if what was done be to be considered as a sufficient delivery at the *office,—whether it ought not also to be held to have been enrolled on that day, although, in point of fact, the formality of ultimate enrolment should not be completed till some subsequent day. On that

point the case in Dyer,[†] would of itself, perhaps, seem to be an authority that it ought not; but the marginal notes to that case show that that decision, as reported, has never since been considered as law, and the cases referred to in those notes are *The Dean and Canons of Windsor v. Middlemore*, (cited in *The Dean and Canons of Rochester v. Sir Miles Sandes*,[‡] *Ludford v. Gretton*,[§] and an anonymous case of East. T., 3rd Eliz. To the same point also were cited *Garrick v. Williams*,^{||} and *Deponthieu v. Pennyfeather*.[¶]

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In all events, however, (they contended) the certificate of the officer of the time of the enrolment must be taken to be conclusive, and nothing can be averred against it; for although it is true that the statute does not require the time to be noticed in the enrolment, yet in common sense, and for obvious convenience, it must be considered a most material part of the record, for often (as in the present case) every thing may turn on that fact. The enrolment here is not denied; the dispute arises as to the time. After the 16th of Eliz. it became a rule in practice, that the date of enrolments should be inserted, and the reason is *obvious. Wherever, therefore, the officer certifies the time, the books all hold that it must be taken to be part of the record, and that therefore it cannot be averred against; and they cited *Holland and Franklin's case*,^{††} *Sir Thomas Howard's case*,^{‡‡} *Lil. Pr. Reg. p. 89 A. (b)*; *Worsley v. Filisker*,^{§§} *Kinner-sley v. Orpe*,^{|||} and *Garrick v. Williams*.

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But even if it were not conclusive on that point as a record, they contended that on the evidence, if it were to be let in, it would have appeared to have been enrolled in fact on the 22nd, for the deed was, they submitted, actually enrolled on that day, because it was then left at the office.

To meet the objection of the clerk having no authority to alter the record, they insisted that a mere misprision might be amended at any time, as was constantly done; and in a late case even after a writ of error brought:—that the present

[†] *The Duke of Somerset's case*, Dyer, 1 Marsh. 261).

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[‡] Moore, 676.

[§] Plowd. 490.

^{||} 3 Taunt. 540.

[¶] 15 B. R. 603 (5 Taunt. 634;

^{††} 1 Leon. 183, and *Holland and Boin's case*, 2 *ib.* 121.

^{‡‡} Owen's Rep. 138.

^{§§} 2 Roll. Rep. 119.

^{|||} 1 Doug. 56.

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amendment had been no more than a voluntary correction of an accidental mistake : and they submitted that even if the clerk had done wrong in spontaneously making the alteration, the Court were bound by it, if it be found to be right when called for, however reprehensible it might be in the clerk who has taken on himself to do so, *Garrick v. Williams*. If, indeed, the record had been altered *from right to wrong, it might perhaps have been restored, on application by them to the Master of the Rolls, for that purpose, but until that was done, it was binding and conclusive ; and they stated that, in point of fact, a petition had been presented for that purpose, but his honour had refused to entertain the application.

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As to the suggestion of possible collusion, if there were any such thing capable of being proved, they insisted that it should have been pleaded specially, and that it should have been replied, that the date had been altered *per fraudem*.

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Dauncey, in reply, urged the distinction which, he submitted, subsisted between the record of the fact of the enrolment, and of the time of that fact, against the arguments pressed on the other side to sustain the proposition that the date of the enrolment, as part of the record, could not be averred against. And he insisted that another distinction arose, on this being a case where the record had been altered from right to wrong, and that therefore, on those grounds, the cases which had been cited did not bear against the arguments used in support of the present rule. Those cases, too, (he submitted,) which had been opposed to the authorities cited against the rule, were cases where the parties disputing the day of the enrolment were parties to the instrument, and were on that account held to be precluded : whereas, in the present case, the prosecutors of this extent were strangers ; and that is the distinction taken in the case of *Holland v. *Downe*, cited from Saville†—a distinction which (he observed) reconciled the apparently contradictory decisions to be found in the books, and which should be the groundwork of the doctrine which the Court were about to establish by their decision on the present question.

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This is a case, not only of great importance to the parties, but involving, in point of practice, a question of considerable moment to the public; I am, however, desirous of deciding it now, on the recent impression of my mind, unless my brothers should wish to take time to consider it.

[His Lordship then stated the facts and the question.] The point itself lies in a narrow compass, and in an ordinary case would not have so much occupied the attention of the Court. On the one hand it is contended, that the enrolment is not of itself a record, and that it therefore admits of an averment impugning its date. On the other hand it is insisted, that being a record, it is conclusive; and that as the certificate states the deed to have been enrolled on the 22nd of July, it must be taken to be true, and cannot be further inquired of.

Another question is, whether,—if evidence could be let in to shew the true day on which the deed was actually enrolled,—from the statement of the testimony before the Court, the deed was not, in point of law, under those circumstances, in fact, enrolled on the 22nd of July, the day on which it was brought into the office.

On the first point there exists much contradiction in the cases; but, on due consideration, I am of opinion that, as to all that relates to the fact of enrolment, it must be treated as a record; and I take it that, from its very nature, it must be so considered. The distinction is plain. The instrument itself is certainly not a record: the certificate of its having been enrolled is. The history of enrolments is well known. The preamble to the 27th Hen. VIII. ch. 10 details the inconveniences which arose from the effects of the clandestine nature of the doctrine of uses; and it was intended that those inconveniences should be obviated, by that Act requiring deeds of bargain and sale to be enrolled in some court of record, thereby supplying that notoriety, from the absence of which, in such modes of conveyance, so many mischiefs were said to have arisen. The object of enrolment, then, was to give publicity to such conveyances, as in the case of letters patent, which are null unless they have been duly enrolled. All this goes to illustrate the position, that enrolment

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is matter of record. The case most relied on for the Crown is that of *Holland v. Dourne*, in Saville, which is also reported, and with some difference in Owen; for it is stated in Saville, that the Court let the parties in to aver against the record; whereas, according to Owen, the record was held to be a bar, and conclusive. But giving the Crown the full benefit of that case, as reported in Saville, yet there have been cases in more modern times which have established, that no averment or evidence shall be received to shew that the day of the date of an enrolment is incorrect. It has been said *that *Hynde's* case is in favour of the argument used for the Crown on this point, but I think that case makes much more strongly for the defendants, on the present occasion; for in that case, which arose entirely out of the practice, then usual, of dating generally as of the Term, which is always considered as relating to the first day of Term, the Court would not suffer that usage to work an injustice; and the whole reasoning of the Court on that decision tends to shew that they treated the enrolment as a record, and one which concluded all men from denying any thing appearing within the record, as antedate, &c.; but they certainly held that they might take an averment which stood with the record, and did not impugn any thing apparent within it. Now here the precise day of the enrolment is apparent within the record, and therefore, according to that case, cannot be impugned by going into evidence in support of an averment against it.

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Then the very modern case of *Garrick v. Williams* is quite decisive on this point against the Crown. It was in evidence there, that the enrolment had originally stood unquestionably wrong, and that it had afterwards been made right by the clerk, of his own authority. It was contended that the clerk had no right to do so without leave of the Court; but the Court of Common Pleas held, that the enrolment was conclusive. On that occasion the matter had been brought before the Master of the Rolls, on an application to have the alteration restored to its original state, who put this unanswerable question to the counsel who were in support of *the application:—"Is there any case wherein a Court has been called on to alter a record from what was right to what was wrong?" The petition was consequently

dismissed. That is also an authority to show that these enrolments are records.

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It can hardly be necessary to go to the other parts of this case, or to give an opinion that where all that it is possible for the party to do, whose object is to procure the enrolment of a deed, has been done by him, although the last ceremonials of enrolling, which it is the duty of the officer to perform, yet remain to be done, it is sufficient. The position from Lilly's Practical Register, only goes to what has been admitted throughout, that the time of an enrolment may be tried *per pais*, but that is only where it is no part of the record. The case in Dyer,† I consider as of no authority; but as to the marginal notes appended to it, they bear unquestionable marks of having been added by some person eminent in the profession. The case in Moore, of the *Dean and Canons of Windsor*, and that of *Ludford and Gretton*, in Plowden, appear to have been the foundation of the marginal note to the case in Dyer, and I think it completely destroys the principal case.

Then, if this is a record, and I think it unanswerably is, the enrolment is recorded to bear date of the 22nd of July, and concludes all question as to the erasure; and even if evidence were admissible, enough would appear to shew the enrolment to have been made on that day. If Young had *been in the office on the 22nd, when the deed was brought in, it seems to be admitted that it would have justified the date as of that day, and it would have been for all purposes an enrolment. In point of fact, however, he did not attend then, but it is proved that his servant received it into the office, and by his authority deposited it on his desk that night. It is quite clear, too, that the party desirous of having the deed enrolled had, by bringing in the deed, done all that it was in his power to do towards its enrolment.

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It is then said that the deed was not brought in in office-hours, but there are no appointed office-hours established or recognized by the Act, so that the party has the whole day in which to do it.

I was somewhat staggered by the argument, that it is not required by the Act that the day of the enrolment should be

† *Duke of Somerset's case*, Dyer, 355.

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recorded, but if it has always been the practice to insert the date, as it appears to have been, I think that is a sufficient answer. It certainly is a very convenient regulation that the date should be inserted, and whenever it is, it must be taken as forming part, and an essential part, of the record. The party, therefore, having done all he could towards the procuring this deed to be enrolled, and it having been accordingly recorded as enrolled on the day on which it was brought to the office, I consider that record as conclusive, and that all parties are bound by the effect of it, and consequently this rule must be made absolute.

[511] Wood, Baron :

My brother GRAHAM having gone so fully into the question arising on this case, I might consider it sufficient for me to say, that I entirely concur with him ; but in a matter of this very great importance, where the points have been expressly reserved for the decision of the Court, it is proper and necessary that I should state the grounds of the opinion which I now deliver.

The certificate of the enrolment of this deed of bargain and sale, offered in evidence, is dated the 22nd of July. It is objected that that is not the true date, and that proof that it is not so is admissible, to shew that it was originally and properly dated as of the 24th, in which case the Crown's extent would be entitled to the preference, otherwise the bargain and sale would have priority. The questions then are, whether the enrolment of this deed is a record, and whether the date is part of it, and whether it is a record of such a nature as that evidence may be received to contradict it. It appears by the cases to be the opinion of all the Judges, that it is such a record, and that evidence on an averment against it is not admissible. A distinction was attempted to be made in argument between the fact and the time of the enrolment ; but the time of the enrolment is a material part of the fact of the record, and if so put in issue it might have been tried by the record. In the case of *Ludford v. Gretton*, in Plowden,† it is said, that “ none can say that the King's charter was made or delivered *at another day than when

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it bears date," (and the reason of that is as stated before, because it is matter of record, and therefore carries in itself absolute verity)—"no more than a man may say that a recognizance or statute-merchant or staple was acknowledged on any writ purchased at another time than when it bears date; for to aver that it was antedated, or that it was delivered or acknowledged after the date, tends to the discredit of the great seal, or of justice, or of the officer of record who recorded the recognizance, or the statute-merchant, and the like." Now, the enrolment of the deed, in the present instance, is a precisely similar case, and therefore you cannot, for the same reasons, aver that it is antedated, because it is an enrolment made by an authorized officer of a Court of record, and so produced by him. Nothing can be stronger as affecting this point than the case in *Dyer*,† as ultimately considered and decided—(his Lordship stated the case at length). The Court of Augmentations is not a Court sitting in judgment, but merely an office of record; and as appears by the authorities collected in the marginal note to that case, it was held, that a deed, when enrolled, vested the interest with relation, and that you are estopped to say, that it is not enrolled according to its date, and the consequence of that doctrine in the case cited from *Moore* was, that the defendant there was ousted of his term. It is said in a note below to have been held in the Exchequer, E. T. 30th Eliz. that the delivery of a deed to be *enrolled in Court makes it a record: *MANWOOD* denying the opinion attributed to him in the case in *Dyer*. Nothing certainly can be stronger than those decisions, to shew that a deed enrolled is to be considered as enrolled with relation to the day it came in. As to the cases which occurred between the statute of Hen. VIII. and the 16th year of Eliz. there is good reason that a party might be permitted to give evidence of the day of an enrolment having been actually made, because it was not the usage at that time to insert the particular day, and if a date was given in Term time, it was general as of that Term which has relation in law to the first day of the Term. This inconvenience attended that practice, that if a deed was not in fact enrolled within six months, should that time have expired

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† *Duke of Somerset's case.*

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by the second day of Term, yet if it were enrolled at any time before the end of the Term, it would have been considered to have been enrolled as of the first day, and therefore it was that the Courts permitted the true day of the enrolment to be given in evidence. As to the regulation adopted of inserting the precise date, I consider that the Judges must have construed the rule as if it had been one of the requisites of the statute. And that is also recognized in Comyns (Bargain & Sale, B. 10, p. 64). On that ground, therefore, I am clearly of opinion, that evidence ought not to have been received to contradict this record.

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I shall say but one word on the question of deeds being to be considered as enrolled on the *day of their having been brought in, although not then actually and *de facto* enrolled. I am of opinion that they ought to be considered, after enrolment, as enrolled of that day by relation; and the case of *Garrick v. Williams* is very strong on that point, where the Court of Common Pleas so held.

As to what has been said of office-hours, the Act of Parliament appoints no such time, and a party has the whole day to bring in his instrument for enrolment; and the officer appears in this case to have been aware of that, who for his own convenience, if he chose to be absent from the office, left a person there for the express purpose of receiving such deeds as might be brought to the office when he should not himself be there; and it is his duty to record the enrolment as of the day on which it is so brought in. The case of *Combes v. Inwood*, in Hutton, I will not advert to; but there is another case to be found in page 63 of the same book (*Jennings v. Pitman*), wherein it was decided, that in the case of those who claimed any estate of persons attainted in the rebellion, where they brought their conveyances to the Exchequer to be enrolled within one year, if they brought and delivered those conveyances it was sufficient, though they be not enrolled, for they have performed as much as was in them.

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Then it is said that the officer had no right to alter this record as he has done; but it would be *monstrous if we, sitting in this Court, were to be examining into the records made by the officers of the Court of Chancery, for it would induce a clashing of juris-

dictions; and the consequences would be absurd, for one Court might hold a deed enrolled on one day and another on some other: nor can we investigate the conduct of those officers over whom we have no controul, or inquire whether they have or have not done their duty. The Court alone by whom they are appointed can do that, but we must take the records as we find them, and are clearly absolutely bound by their import; and to me, in the present case, the enrolment appears to be recorded as made on the 22nd of July.

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RICHARDS, Baron :

I shall be very short, as I am clearly of opinion that evidence ought not to have been received to contradict this record. The case of *Garrick v. Williams* is quite decisive on the point, and it was a much stronger case than the present; for there the officer added to the record four years after the granting of the annuity sought to be set aside, and the Court would not listen to any argument on the misconduct of the officer. The CHIEF JUSTICE, who took time to consider his judgment, says expressly towards the end of it, that the memorial was conclusive, and "that no averment or evidence shall be received to shew that the date is incorrect;" and though the Court reprehended the conduct of the officer, they decided that they were bound by it.

That case came afterwards before the Court of Chancery, on a bill for an injunction to restrain the annuitants from proceeding to execute a warrant of attorney. The bill† stated, amongst many other things, that the memorial was not properly transcribed; and on Mr. *Girdlestone's* brief I find a short note of what the LORD CHANCELLOR said on that occasion. After travelling through the other points, his Lordship proceeds: "If the record

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† *EAGLE v. GARRICK.*

On a former occasion the LORD CHANCELLOR expressed himself in this case to the following effect:— "This Court must consider the record of the memorial in the same point of view as a court of law, and in this case the Court of Common Pleas has decided that it is bound by

the record of the memorial as it now stands: if so, this Court is equally bound, and I must refuse the injunction, leaving it to the grantor of the annuity to file a bill in this Court, for the purpose of having the record restored to its original state, if he shall be so advised."

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have been altered contrary to what it ought to have been, application ought to have been made to the keeper of the records to make it right. At present the record is complete; but if any vice be in it, there may be an application to the Master of the Rolls for the purpose of altering it; but till that time it stands as a good record." The real question was, whether the annuity was enrolled within 20 days. An order was made that the clerk should attend with the memorial itself. Now there was no question of the fact that the deed had not been enrolled within four years, therefore the Chancellor could only have called for the record to see what had been recorded to have been done.

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*The application of the plaintiff in equity was refused at that time, and the MASTER OF THE ROLLS, when applied to afterwards, also declined to interfere. That is certainly a strong case, and is bottomed on sound authorities. I do not presume to say that there are not modes of pleading by which a case may be made where evidence might be admissible in a Court of equity, but on this record there is no such case. The issue is, whether this bargain and sale were duly enrolled, and the plea is supported by producing this record. By the Annuity Act, (53 Geo. III. ch. 141, sec. 7,)† the day and hour are required to be enrolled. Here also the date is of the first importance, and ought to be inserted.

On the other point of the case, if we should have been of opinion that this evidence were admissible, I think it would be sufficient to support the plea. It is impossible to dispute that the lodging the deed in the officer's hands is an enrolment. And indeed the affairs of mankind would be in a dreadful condition if it were not so; for when the deed is once so lodged, the party interested in it loses all dominion and controul over it, and it is from that moment left entirely with the officer. If, as has been contended, an actual and complete enrolment were necessary, this deed has not been enrolled on the 22nd nor on the 24th of July; but the cases all decide that that is not necessary, and that the instant a deed is lodged in the office, from that instant it must be considered as enrolled, and the practice accords with that rule.

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It is admitted in this case, that although the office-hours were

† Repealed 17 & 18 Vict. c. 90, s. 1.

over, if Mr. Young, or any clerk, were then there, the lodging the deed on Saturday the 22nd July would have been sufficient; because, if a deed is received by the officers, it is sufficient: but who are the officers? Is there any particular person or persons named by the act to receive these deeds? Mr. Young is the chief clerk, and he, or other persons appointed by him, are there in order to receive the deeds that may be brought to the office. If he or his clerks receive a deed, either by themselves or by others, is it not precisely the same thing?

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The moment you admit that it was received by Mr. Young at the office, that moment it became an enrolment. It is clear, that if not received by him personally, but by another *bonâ fide* appointed by him, and according to the usual course of the office, it is equally so. Why is it not equally in the office, if so received, as if Mr. Young himself had received it? Mr. Young was examined on the trial, and says, that the office-hours are not the only times when he received those deeds, and that he and his clerks sometimes attend after office-hours. If so, then there is no magic in office-hours. He states that it is the universal practice always to make the enrolment bear date the day it comes into the office; but the enrolment necessarily cannot take place until some days after; but the day on which it comes in is the day upon which the enrolment bears date.

[His Lordship then went through the leading facts of Mr. Young's evidence, and dwelt on the *circumstance of the porter being authorized to receive deeds brought in in his absence.] So that it appears that this porter was as much under Mr. Young's authority as any of the clerks. [He then adverted to the evidence of the clerk, who brought in the deed and left it with the porter.] Now suppose the porter had said he could not do it, then this young man would have gone to one of the clerks. It is impossible to say that the young man (the clerk) was in fault; if there was any negligence at all of the officer, it does not belong to him. [His Lordship then applied himself to the consideration of the remainder of the evidence and observed that] Such being the facts of the case, and there being nothing of fraud to affect the question, I should conceive that this delivery of the deed in question, by this young man to the porter left in

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charge of the office, is as much a leaving at the office as if it were left with the officer himself, or any of his clerks. But then it is said, that there is no minute made of such delivery. That is only a plan adopted for the convenience of Mr. Young himself. Suppose the minute had not been made for a week, it might be asked, would that affect the enrolment? Certainly not. If the officer choose to trust to his memory as to the time when a deed is left, he has a right to do so. There is no injustice in saying that he may do it. He puts it down in order to remember the day of delivery. He puts it down in his minute or day-book, but that could not be more a public notice than the lodgment of the deed in the office; and if it be not absolutely necessary that the enrolment should be *made at the time, (and I have heard no case cited to shew that it is so in point of law), that which has been done, was in all respects sufficient. But in point of fact, how is any publicity given to the enrolment taking place, when the formality of enrolment is an act which may not be performed for a great length of time after the deed is brought in? It certainly was not intended for the purpose of making the matter public.

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Upon the whole, it seems to me that the first point—that a record cannot be averred against having been decided to be law—makes the consideration of the other unnecessary; but if that were to be acted upon in the event of the other failing, I should conceive that the circumstance of the deed being lodged in the office with an accredited agent of the principal clerk or officer, in the absence of all fraud or other circumstances to impeach or affect it, is as good and as legal a delivery as if it had been handed to Mr. Young himself; and I am therefore of opinion that we should make this

Rule absolute.

ROBINSON *v.* WILKINSON.

(3 Price, 538—546.)

1817.
Feb. 5.

[538]

A creditor is entitled, although he has dealt with the ostensible partner as his debtor, to sue a dormant partner—if unknown to him to be so at the time of furnishing the subject matter of the debt—for whatever had been supplied to the firm during the partnership.

It is not an answer to the circumstance on which the reason of the rule is founded—the partnership not having been known to the plaintiff—that it might have been known to him if he had used diligence, inasmuch as the defendant (the partner not originally known) had been a registered part-owner of the ship on account of which the goods had been supplied, at the time; because the register is not readily accessible, nor conclusive when found.

None of the acts done by an ostensible partner, which are usually held to operate to discharge the others—such as selecting one, accepting new bills, &c.—will operate to discharge a partner not known to the creditor, if done during the time of the concealment of such partner.

In this case, which was an action of assumpsit for goods sold and delivered, a verdict had been found for the plaintiff, (Hants Sum. Ass. 1813,) damages 449*l.* 10*s.* 5*d.*, costs 40*s.*,† subject to the opinion of the Court on a case, which was in substance as follows:—The plaintiff was an agent and ship-chandler at Portsmouth. The defendant, and Christopher John Cay, before and in the beginning of the year 1810, were registered owners of the ship *Lord Eldon*, of which Ralph Symes was master. The defendant continued a part-owner till the 15th of June, 1810, when he sold his interest in her to Mr. Cay, who then became the sole registered owner of the ship, and continued owner during the whole time in which the debt due to the plaintiff was contracted; in the months of May, June, July, and August, 1810, the ship *being at Portsmouth, the plaintiff supplied her and the captain with stores and cash on account of the ship to the amount of 1014*l.* 5*s.* 4*d.*

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The amount of the debt up to the time when the defendant ceased to be a part-owner, was 401*l.* 16*s.* 1*d.* (See the note).†

† The verdict was afterwards altered to 401*l.* 16*s.* 1*d.*, the precise amount of the debt due at the time the defendant ceased to be a part-owner. The account stood thus:—Goods

supplied, 21*l.*; cash, 376*l.* 1*s.* 5*d.*; balance of former account, incurred whilst defendant was at Portsmouth, 3*l.* 17*s.* 8*d.*—401*l.* 16*s.* 1*d.*

ROBINSON The master drew bills, dated 2nd August 1810, on the ship's agents
v.
WILKINSON, in London, for 264*l.* 5*s.* 4*l.*, and 750*l.*; total, 1,014*l.* 5*s.* 4*d.*, the
whole amount of the plaintiff's demand. After these bills were
drawn and sent for acceptance, Cay wrote to plaintiff to say the
demand would be settled, but requested he would withdraw the
bill 750*l.*, and draw on him for it at three, four, and six months,
which plaintiff did on 3rd November, 1810, when he wrote to
Cay the following letter :

“ Yours, without date, I received on Saturday, and have valued
on you as on the other side,” (alluding to a statement, on the
other side of the letter, of the amount of the sums for which the
three new bills were drawn,) “ and past the several drafts through
my banker's hands, which I should hope would be duly honoured ;
I assure you it's quite contrary to my mode of doing business ;
and you must be aware it's not regular to renew bills, particularly
to six months ; and you will not fail giving directions to Messrs.
Welbank and Petit to accept the other drafts, as I cannot think
of renewing them.

“ I shall return you captain S.'s draft when I have your
acceptance.”

[540] The other drafts alluded to in the above letter were the bill
for 264*l.* 5*s.* 4*d.* above stated, and which was not then due ; and
another bill for 68*l.* 2*s.*, which had been drawn for some articles
furnished by the plaintiff in August, 1810, and which were not
included in the 1,014*l.* 5*s.* 4*d.* These bills were paid, but the
three bills which were given in lieu of the one for 750*l.* were
dishonoured by Cay, who proved to be insolvent ; and to prevent
his bankruptcy he proposed to the plaintiff to pay him a compo-
sition or dividend of 13*s.* in the pound, secured by the accep-
tance of his friend, a Mr. Wilson, of Bishops Wearmouth, (a
partner in the firm of Spence and Wilson,) for the balance due,
which the plaintiff agreed to take in full discharge of such
balance. This acceptance not being transmitted so soon as
expected, the plaintiff's attorney, on the 8th of May, 1811, sent
the following letter to Messrs. Spence and Wilson :

“ Mr. Robinson has been with me again respecting his demand,

and is somewhat distressed at the apparent neglect paid to the business; I must therefore beg of you most earnestly that you write me, by return of post, the reason of delay in the payment of the dividend by the remittance of the promised bill."

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After this letter Wilson accepted a bill drawn by Cay for 13*s.* in the pound, of the demand payable at eight months after date, which was sent to the plaintiff.

This bill, which was negotiated by the plaintiff, was also dishonoured, both drawer and acceptor having become bankrupts before the bill was due, and no part of the amount has been received.

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At the period of these several transactions, the plaintiff considered Cay as the sole owner of the ship, and did not know that the defendant was a part-owner; immediately on his discovering this fact he made a demand on him, and he refusing payment, this action was brought: the writ was issued in September, 1812.

The defendant contended that he was discharged from the payment of any part of the demand. The plaintiff insisted that the defendant was liable to the whole demand due when he ceased to be a partner; and that if he were entitled to any credit on account of the bill for 264*l.* 5*s.* 4*d.* it was only to the sum of 21*l.*, the amount of the plaintiff's claim on account of goods supplied by him to the time of the defendant's ceasing to be a part-owner of the ship.

Gaselee, (abandoning the question on the 21*l.*) insisted that the plaintiff was entitled to keep his verdict for the remainder, for that the present case was distinguishable from all those which go to determine that the acceptance by a creditor of one of several partners, as his debtor, works a discharge of the rest; because it is found as a fact, in this case, that the plaintiff, at the time of furnishing the goods supplied, was ignorant that the defendant *had been a partner of Cay, the insolvent. It is said by Lord MANSFIELD, in *Hoare v. Dawes*,† to be clear law that dormant partners are liable, when discovered; and on that rule the plaintiff relies.

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† Doug. 336.

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Lawes, E., contra, submitted that the plaintiff could not avail himself of that want of knowledge in this case, even if it gave him a right to recover; because, as it is found that the defendant was a registered owner of the vessel, the plaintiff might have known it, and ought, therefore, to have made himself acquainted with the fact of what persons were the owners of the vessel when he supplied her with stores.

It was then contended that another insuperable objection was opposed to the plaintiff's right to recover in the present action against this defendant, and that arose from his having taken Cay's sole bill, and his having allowed him to renew it when it became due. For in the case of *Reed v. White*,† it was held by Lord KENYON that a plaintiff dealing with one partner separately, adopts him to the discharge of the others. In that case a bill had been drawn on and accepted by one of several partners, and being dishonoured was renewed by him alone. In the case of *Evans v. Drummond*‡ also, it was ruled by the same authority, that after even a joint bill has become *due, if the holder take the separate bill of one, he discharges the rest. But this case goes farther, for the plaintiff afterwards accepts the security of a third person, (Wilson) by the bill drawn on Wilson and accepted by him, and such acceptance by a third person has been decided to be a satisfaction, otherwise it would have been a fraud on Wilson, according to the case of *Steinman v. Magnus*.§

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To oppose the point made on the fact of its not having been known that the defendant was a partner, the case of *Newmarch v. Clay*,|| was cited as establishing, that an unknown partner was discharged by the delivering up of old dishonoured bills, and receipt of others. The fact of some part of the whole demand having been paid was adverted to as raising a question of appropriation, and particularly as to the bill for 264*l.* 5*s.* 4*d.* which had been actually paid. And the case of *Dubois v. Ludert*,¶ was cited to shew that a defendant might plead in abatement, that he had a partner, although he were a secret one, and the plaintiff could know nothing of it.

† 5 Esp. 122.

‡ 4 Esp. 89, 91.

§ 2 Camp. 124; 11 East, 390.

|| 14 East, 239.

¶ 5 Taunt. 609; 1 Marsh. 246
[overruled, *Mullett v. Hook* (1827)
Moo. & Mal. 88].

Gaselee in reply, relied on his former position, and contended that the ship's register would not charge a person named therein as part-owner, *Tinkler v. Walpole*,† To hold that a man *must know all the parties connected with the person with whom he contracts, before he sues, would render it impossible to proceed against any person who had a dormant partner. The case of *Newmarch v. Clay* does not apply. The question there was merely as to the effect of a specific appropriation, and that being decided as it was by that case, the plaintiff had been overpaid during the period of the defendant's partnership. As to all the other cases, the distinction here is, that the partner was unknown.

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GRAHAM, Baron :

The fact of this defendant Wilkinson not being known to be a partner at the time the goods were furnished, certainly goes a great way to decide the several points of this case, and distinguishes it from most of those which have been cited for the defendant. In general, a release of one partner is a release of all, but a party has always a right against a concealed partner of whom he has previously had no knowledge, as soon as he discovers him, unless that ignorance were his own fault, as if he had not used due diligence in finding him. But it is not to be expected that the plaintiff must search for a ship's register all over the kingdom, which after all is not conclusive.

Then it is said that the plaintiff discharged the defendant by accepting the bill drawn on Wilson by Cay. Had Wilson fulfilled his engagement it would have been a discharge, but on his failing to do so, the debt against Cay remained undischarged, *the plaintiff had a right to resort to his original remedy, which was then revived against all persons primarily liable.

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The case of *Newmarch v. Clay* was one very differently circumstanced, and raised a different question, which was answered by the fact of the debt of the unknown partner having been satisfied out of money clearly appropriated to its payment at the time. In this case that goes only to the 21l. and that sum must be deducted, and the balance will be what the plaintiff is entitled to recover.

† 14 East, 226.

ROBINSON Wood, Baron: (having shortly stated the facts of the case:)

WILKINSON. This defendant was not known to be a partner when the goods were supplied, but as soon as his partnership is discovered the plaintiff sues him. And there is no doubt that in respect of the stores furnished during the period of his partnership he is liable. Then it is contended, that the drawing these various bills discharged the defendant. And so it would if they had been paid, but drawing bills which are afterwards dishonoured is no discharge. As far as they were paid they are a discharge, and therefore the 21*l.* must be allowed. If Cay had been discharged, the defendant as his partner would have been discharged, but that was not so here.

RICHARDS, Baron, of the same opinion:

[*546] The question is, whether this defendant is discharged by any thing that has taken place. Whatever effect *any or all of these transactions might have had if Wilkinson had been known to be a partner of Cay, is entirely put out of this case, because the plaintiff certainly dealt entirely with Cay, and knew nothing of Wilkinson, who was nevertheless clearly *prima facie* liable.

It is clear law that a dormant partner cannot discharge himself from liability to pay the debts of a creditor through the medium of his ostensible partner by any acts of his during the concealment of the unknown partner. If it were otherwise, and this action be not maintainable, a door is widely opened to defraud creditors by means of dormant partnerships. If the plaintiff had originally known that this defendant had been a partner he would not have dealt with Cay alone, or if he had discovered it earlier he would probably not have done many of those acts which, without such knowledge, he has done.

It is quite clear that this verdict ought to stand for the 38*l.* 16*s.* 1*d.*

Postea to the plaintiff.

JERRITT *v.* WEARE AND OTHERS.†

(3 Price, 575—604.)

A lease by a stranger and entry by the lessee do not necessarily amount to a disseisin. Where the lessor is estopped by privity or otherwise from disputing the true title, and has made the lease without adverse intention under a mistake as to boundaries or parcels, the possession of his lessee is not adverse.

A previous deed operates by way of estoppel by matter in writing, against a subsequent act of disseisin.

So does acceptance of rent by matter *in pais*.

THIS was an action of covenant tried at the Summer Assizes, 1813, at Gloucester, before Mr. Justice Bayley.

The action was brought on the covenants in an indenture of release, grounded on a lease for a year, bearing date 2nd September, 1799, and made between [the defendants and other persons since deceased] * of the one part; and the plaintiff, and one Moses Daniel, of the other part: By which the parties of the first part, in consideration of 2,000*l.* granted, bargained, sold, released, and confirmed to the plaintiff, and Moses Daniel, their heirs and assigns [*inter alia*] all those several messuages, &c., * * called their Conham Estates and Works, containing in the whole 97 acres, 2 roods, 5 perches or thereabouts, and particularly set forth in a plan made thereof, * * to hold to plaintiff and Moses Daniel and their heirs, to the uses for the benefit of the plaintiff, his heirs, appointees and assigns; to be holden of the chief lord or lords of *the fee or fees of the same premises, by and under the rents and services therefore due and of right accustomed; and also to a certain annual sum of 10*l.* for the support of a meeting-house therein mentioned. And defendants and the deceased grantors covenanted with the plaintiff, that they immediately before and at the time of the sealing and delivery of the said indenture, were lawfully and rightfully seized of, interested in or entitled unto all said hereditaments, of a good, sure, perfect and indefeasible estate of inheritance in fee simple, without

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Nov. 8.1817.
Feb. 11.

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† Cited (*arguendo*) by Sir W. Follott in *Davies v. Lowndes* (1838) 5 Scott, 857. As pointed out by JAMES, L.J. in *Leach v. Jay* (1878) 9 Ch. Div. 42, 44; 47 L. J. Ch. 876,

“there are such things as seisin and disseisin still.” See Preface, and see *Lyell v. Kennedy* (1889) 14 A. C. 437, 59 L. J. Q. B. 268.—R. C.

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any manner of condition, trust, limitation, use or uses, estate or estates tail, contingent remainder or remainders, or any other estate, matter, cause, restraint, or thing whatsoever, whereby to alter, bar, change, charge, burthen, impeach, incumber, or determine the same, except only as aforesaid: And also, that defendants and said deceased grantors, immediately before and at the time of the sealing and delivery of the same indenture, had in themselves, or some or one of them had in themselves or himself, and in their, some or one of their own rights or right, full power, good right, and lawful and absolute authority to grant, bargain, sell, alien, release, and convey all said hereditaments unto the plaintiff and Moses Daniel, and their heirs, to the uses and upon the trusts in the said indenture of release expressed.

The plaintiff by his declaration assigned a breach of each of the said covenants as to the premises generally, without any specification as to part.

[578] There are also other covenants in said conveyance, viz. covenants for quiet enjoyment, free from incumbrances, and for further assurances, which are restrained and limited to the acts and deeds of the grantors, and all persons lawfully claiming or to claim by, from, or under them.

The defendants pleaded that they and the other grantors, immediately before and at the time of the sealing and delivery of the said indenture, were lawfully and rightfully seized of, interested in or entitled unto all said premises; and also, that defendants, &c. immediately before and at the time of the sealing and delivery of the said indenture, had in themselves, or some or one of them, and in their, some or one of their own rights or right, full power, good right, and lawful and absolute authority to grant, &c. Upon the above two pleas issues were joined.

There were two other pleas, introducing the qualified covenants of the defendants, to which the following facts not being so pointedly applicable as to the issues already stated, they are not set out here.

Upon the opening of the case at the trial, it was agreed, that the damages should be assessed by an arbitration if the plaintiff should obtain a verdict upon either of the issues.

On the part of the plaintiff it was proved, that in 1790 or 1791, and for five or six years afterwards, *one John James worked a small quarry of stone on part of the lands in question, being the very outskirt of the defendants' premises, called their Conham estates and works, and bordering upon the waste of the manor of Barton Regis, as to which the breaches of covenant were assigned, and being part of the lands leased to Bell, as herein-after mentioned, under the authority and by the licence of Mrs. Chester, the lady of the manor, and the successive owners of the manor; and paid an annual acknowledgment of two guineas to Mrs. Chester, and her successors, for working the said quarry; part of the land in question was covered with low brushwood, and part with the cinders and ashes from the defendants' works. By indenture, dated the 1st day of August, 1792, Mrs. Chester demised part of the lands, being then a parcel of waste ground, and described as three-quarters of an acre, with the abutments and boundaries, (and on which a lettaget was afterwards built by the lessee,) to William Tyler, for ninety-nine years, if three persons or the survivor should so long live, at the yearly rent of 2s. 6d. And by another indenture, dated the 4th day of July, 1792, Mrs. Chester demised other part of the premises, being a cottage or tenement, and garden, and small plot of ground, containing four lugs (with the exception of the mines and quarries, and liberty to work the same,) to one Bell, for a term of ninety-nine years, if three persons or the survivor should so long live, at the yearly rent of 2s. 6d. Mrs. Chester departed this life in the year 1797, leaving Thomas Masters, Esq., *heir at law; and the lessees respectively entered on the premises demised to them respectively, immediately after the date of the leases to them respectively, and continued in the exclusive possession thereof down to the time of this trial; and the reserved rents on the leases have been regularly paid by the lessees, and those who claimed under them, to Mrs. Chester, during her life, and after her death to the said Thomas Masters.

On the part of the defendants it was proved, that they were partners in Bristol in carrying on the copper and brass trades upon an extensive scale; that the premises which they sold and

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† Sic: apparently "cottage" is meant.—F. P.

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conveyed to the plaintiff were one set of their works, called their Conham works, consisting of all the particulars set forth in the plan annexed to the conveyance to him, and the table of contents at foot thereof, viz. large copper and brass works, and various yards and extensive lands round the works, which had been damaged by the smoke thereof, a manager's house, and various cottages and gardens for their workmen, including the cottages and land in question, in the whole 87 acres 2 roods and 5 perches.

[*581]

That coal in the neighbourhood growing scarce, they, in 1792, shut up those works and opened others in Wales, and their manager and principal workmen were removed into Wales, and those works were abandoned and left unprotected, open and void, and fell into a ruinous state, and lay in *that state till 2nd September, 1799, when they sold them to plaintiff, and made the conveyance to him as stated in the declaration.

That as they had another large set of works adjoining, called the Cupola works, which were stopped at the same time, to avoid any mistake as to the particulars sold to plaintiff, those sold to him were all set forth in the plan annexed to the conveyance, which in the deed is declared to be a copy of their plan of those works made in 1776, and contained in the book of maps of their several estates.

That from the date of their conveyance to plaintiff, viz. 2nd September, 1799, no complaint was made to them by plaintiff, or any one for him, that he had not obtained possession of all the premises conveyed to him; on the contrary, he sold the whole to one Lukin; and in 1806, he repurchased them of him; and in 1808, nine years after the sale and conveyance to him, he, for the first time, by letter dated 26th October, 1808, from his solicitors to defendants' solicitors, made complaint that he had not obtained possession of the parts now in question, being part of No. 23 and No. 24, as marked upon the plans.

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The defendants then put in and read a deed of feoffment, dated 27th Nov. 1654, whereby Thomas Chester, Esq., the then lord of the manor of Barton Regis, sold and conveyed to Michael Dayas, in fee, a messuage, tenement, orchard, garden, and thirty acres of land, with a coppice belonging, *called the Outwoods, alias Conham, situate in the hundred of Barton Regis, in the

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county of Gloucester ; with all waste grounds, woods, and woody grounds to the same belonging, under the yearly rent of 5*s.* ; and that copper and brass works were erected on the premises in the last deed : various other deeds were put in and read, deducing the title in the last mentioned deed to defendants and their partners, who sold and conveyed them to plaintiff. It was also proved that the parcels in question, viz. Nos. 23 and 24, No. 23, consisting of 2*a.* 3*r.* 10*p.*, and No. 24 being a house and orchard, comprising 1*r.* 4*p.* in the conveyance from defendants to plaintiff, were parts of said premises, in the conveyance from said Thomas Chester, subject to the said yearly rent of 5*s.*

That said Mrs. Chester, who succeeded to the estates of the Chester family, actually received said rent of 5*s.* of defendants, before and at the time she granted said leases to said Bell and Tyley ; and she continued to receive the same of them from the time of granting those leases up to her death in 1797 ; and that Mr. Masters, who succeeded her in the estates of the Chester family, continued to receive said yearly rent of 5*s.* of defendants up to the date of their conveyance to plaintiff, viz. 2nd Sept. 1799.

That the premises No. 24, were occupied by the workmen of defendants, and their families, free of rent ; and that No. 23 was the place where the ashes of the works were deposited, and was always *called the Ashbank, belonging to the said works ; and that the ashes of the works were upon it at the date of the conveyance from defendants to plaintiff.

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That defendants regularly cut the brushwood and fern upon these parcels, and used the same at their works as often as the same were fit to cut, up to the time they shut up their said works, as before stated.

Upon the above evidence the learned Judge, notwithstanding it was objected on behalf of the plaintiff, that prior to the conveyance to him by the defendants, they were disseised of the cottages and land in question, by Mrs. Chester and her lessees, and consequently could not support their issues, directed the jury to find a verdict for the defendant ; stating his opinion to be, that there was a wrongful dispossession only, and not a disseisin.

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The jury found a verdict for the defendants.

In the ensuing Term an application was made to this Court to set aside the above verdict, and have a verdict entered for the plaintiff; and on such rule coming on to be argued, the Court desired the above facts to be stated in a special case for their opinion.

The question for the opinion of the Court was, Whether the plaintiff was entitled to recover? If he were, the present verdict was to be set aside, and a verdict to be entered for the plaintiff; if not, the verdict to stand.

1816.
Nov. 8.

[584]

Preston, for the plaintiff, contended, that the leases of Mrs. Chester, and the entry of the lessees, and payment by them of rent, amounted to an actual disseisin, and the consequence, he contended, would be, that the defendants had no right to convey the cottages and land so leased and entered on, and therefore could not support their issue. If the defendants were in fact so disseized, he insisted, they must have regained their seizin to enable them to grant to a stranger; that not having done so, they had only a mere right, and a right of entry is not transferrable. That proposition is clearly laid down in *Shep. Touchstone*, p. 139, Co. Litt. 214 b, and *Lampet's case*.† He insisted that the defendants could not have obtained possession against the cottagers, whose title was adverse without entry; and that that right of entry was not transferrable. Before the authorities were adverted to, it would be proper, he submitted, to consider the case on general principles. Every person in possession must be so by estate or by sufferance; and where two persons are in possession, one with and one without title, the law treats the estate as in him who has the right. Disseisin, and a consequent possession without right, is the lowest interest a man can have, but it is one which is often the foundation of a fine. An entry, generally, on any possession, is a disseisin, and every adverse entry on the possession of a freeholder, and an ouster is a disseisin. There cannot be a dispossession of a freeholder as contra-distinguished from disseisin, otherwise *a

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† 10 Co. Rep. 48 b.

trespasser could never gain a title. The case of an entry on a tenant for life or years, in possession, for the purpose of claiming his estate, is indeed no disseisin of the fee, because there is no adverse possession or title against the reversioner ; but a general entry would dispossess the termor, and disseize the owners of the inheritance. A disseisin of tenant for life, claiming his estate only, is no disseisin of the reversioner, because it does not divest his (the reversioner's) estate ; but if an ejectment had been brought by the defendants against these cottagers after twenty years' possession, they could not have recovered, for the cottagers had an adverse possession, and were tenants to their lessor. The real circumstances in this case raise this question : Does a stranger by making a lease acquire a seisin in the freehold ? In other words,—Is he a disseisor ?

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And certainly it does amount to a disseisin, as the entry of the lessee would in law be considered to be by command of the lessor ; and there cannot be a tenant in possession, as of a particular estate, without a reversion or remainder expectant on it in some person ; nor can a lessor make a lease reserving rent without necessarily claiming title to the reversion whenever the lease shall expire. Every lease supposes and admits a lessor. Whenever a particular estate is created, there must be a reversion, out of which it is derived.

There are conflicting decisions on this question, but the weight of authority is in favour of the proposition, *that a stranger, by making a lease, gains the freehold by disseisin against the lawful owner, and drives the disseisee to his assize or entry. There is a distinction between disseisin in fact, and disseisin at election ; and it has been attempted to carry disseisin at election to an extent which would destroy all notion of actual disseisin, so well known to the law, and so long established. Disseisin at election is never an actual disseisin. It only serves to give the disseisee a remedy by assize, and never gives the freehold ; whereas, an actual disseisin gives an incipient title, under which a sixty years' possession, or a fine and non-claim, would clearly bar the disseisee, and all claiming under him.

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And the question now before the Court is, Whether what has been done in the present case does amount to such a disseisin as

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turns the estate into a right of entry? The earliest authority on this point is in the year book of 12 Edw. III. fo. 12, b. pl. 5. It was in that case held, that a tenant at will, making lease for a term of years in his own name, is a disseisin; the reason is, that by such an act a tenant at will has no longer any interest in the premises; he has determined his tenancy by his own act, and therefore, as a stranger claiming a right, he acquires a freehold by disseisin. Bro. Abr. title Disseisin, pl. 67, 68, is to the same purport. A man, by making a lease for years, under which the lessee enters, and the lessor receives rent, makes the lessor a disseisor. Ib. pl. 76, 77, and *Rourse's* case.†

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But it will be contended that this law is obsolete, and it will be urged, that there are more recent decisions which have since more fully defined a disseisin to be, when one enters intending to usurp the possession, and ousts another of his freehold; and further, that it has been ruled, that it is at the election of him to whom the wrong is done, if he will allow the wrong-doer to be a disseisor, and himself out of possession by disseisin, so that it is at the election of the person put out of possession either to charge the wrong-doer with a disseisin, by bringing an assize, or with a dispossession by bringing any other action. In the case of *Blunden v. Baugh*,‡ the first of those wherein the old doctrine has been attempted to be impugned, it is said, that it is established that there must be an obvious intention to oust the freeholder, and that therefore, *querendum est a judice quo animo hoc fecerit*; but this observation is clearly applicable to those cases wherein the act is doubtful, and cannot apply to an actual disseisin, as the act of Mrs. Chester was. That case has recently been well considered by Lord REDESDALE, whose opinion is given in the report of the case of *Hovenden v. Lord Annesley*.§ There his lordship recognizes the old doctrine, and adverts to the true distinction, that a disseisin at election is where the possession is gained under a title consistent with that of the occupier having the right, and who was in possession. Thus, a mortgagor paying interest cannot disseize a mortgagee by *making a lease, because it may

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† Ow. Rep. p. 28.

‡ Cro. Car. 302.

§ 9 R. R. 119 (2 Sch. & Lef. 607,

621).

be referred to his equitable interest at the election of the party dispossessed. The case of *Blunden v. Baugh*, however, stands alone; and it does not appear that any of the earlier cases which have been adverted to on the present discussion on the part of the plaintiffs were cited or noticed on that occasion; nor was the case of *Shaw v. Barber*,† adverted to there, and that case is in direct opposition to *Blunden v. Baugh*; neither is there, on the other hand, any authority given for the doctrine said to be held in *Blunden v. Baugh*. All the decisions are entirely the other way. That case is indeed recognized by Lord MANSFIELD in *Taylor v. Horde*;‡ but the principle on which the doctrine of Lord MANSFIELD is founded will not bear investigation. It is, that there must be an intention to oust the freeholder to effect a disseisin; but it is clear that the intention of a party cannot control the legal consequences of his acts, and if an act amount in law to a disseisin, it will not be permitted to the wrong-doer to say, that no disseisin was intended by him. If, indeed, it were in the election of the person disseized to choose in all cases whether he would have been disseized or not, there would be no longer in law any such thing as disseisin; nor any bar, by the operation of non-claim on fines; or by the statutes of limitation, for those statutes never operate by way of bar, unless there has been an actual disseisin. Then the sole *question is, whether there was in this case a disseisin in fact, for if there were, the plaintiffs had no title to convey without a previous re-entry.

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As to the fact stated in the case, of part of the demised premises being in the possession of the defendants, who used it as a cinder-bank, it would be absurd to contend that the throwing the cinders of the works on other land kept the possession of the cottages and lands in question. That the lessees were in the occupation of the cottages and gardens and land, is a sufficient answer to that part of the case. To state that fact, is at once to answer it, for possession of other land not within the limits of the cottages and gardens, fully, completely and exclusively occupied, could not be a continuance of the possession, or of seisin of those cottages and gardens.

† Cro. Eliz. 830.

‡ 1 Burr. 112.

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Fuller, for the defendants, (having observed that the question had been much narrowed by the confined terms of the issue in this action of covenant, which reduced it to the inquiry of, whether the defendants were seised at the time of the conveyance to the plaintiffs,) submitted that the leases by Mrs. Chester were, at the utmost, a dispossession, and could not be construed to amount to a disseisin, according to the definition of that act in Co. Lit. 159 b.: nor could they operate to divest the right of the grantors, so as to invalidate their conveyance of the 2nd September, 1799. It was clear that the leases must have been made under a mistake, and that there could have been no intention, on the part of Mrs. Chester, to oust the grantors, or acquire *the freehold; and it is not only necessary to a disseisin that there should be an entry, but an ouster also, (Co. Lit. s. 279, p. 181 a.) Now Mrs. Chester was receiving, not only the rent of 2s. 6d. from her lessee, but also a rent of 5s. from these defendants; so that if there was an entry by her, there was no ouster, and consequently no disseisin. In an anonymous case in Salkeld,† it was laid down by HOLT, Ch. J. that a bare entry on another, without actual expulsion, would not work a disseisin. The leases were, in fact, rather in the nature of an intrusion, which is distinguished by Bracton ‡ from disseisin, as being merely a wrongful possession, "*possessio nuda sine aliquo vestimento.*" The same distinction was taken in the case of *Matheson v. Trot*,§ where it was held that a lease, and entry under it, was not a disseisin by the lessor.

This sort of dispossession might have been either by right or by wrong. There is no doubt that, if the cottagers had got in under a grant from another person, ejectment might have been maintained. After all, it was merely a chattel which Mrs. Chester had granted, and that could not operate to disseize the defendants to whom Mrs. Chester's ancestors had granted in fee, receiving from them a fee farm rent of 5s., and which was afterwards received by Mrs. Chester herself, and for premises of which the *demised lands formed part. In the case of *Good-*

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† Vol. i. p. 246.

Burr. 109.

‡ Ch. 2; and vide *Taylor v. Horde*,

§ 1 Leon. 209.

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right v. Forester,† it was contended in argument that no actual disseisin could be committed by a person making a lease for years, who had not previously entered for the purpose of gaining the freehold; and that no person could, by mere receipt of rent, be an actual disseisor; and for that was cited *Blunden v. Baugh*, *Pousely v. Blackman*, and all that class of cases.‡ And there is much good sense in that doctrine. Nor is it any alteration of the old law, but the result of a better understanding of that law, which has obtained of late years, establishing that no one can be said to disseize who does not claim the freehold, and enter for that purpose, ousting the rightful owner. Now here there was neither a claim of the freehold by Mrs. Chester, nor did she enter in fact, or oust the defendants; nor could she have been aware that, by granting the leases, she was disseising the prior grantees of the freehold, much less could she have intended to do so. It is said, that Mrs. Chester cannot be permitted now to say, that her leases were not a disseisin. In fact, she does not say so; but these defendants, who have nothing to do with Mrs. Chester's grant, say so in support of their own title; and it appears by the case, that at the time when they granted to the plaintiff, they had all the possession which they could have. But if Mrs. Chester herself should disclaim any intention *of committing a disseisin, as she has done, by continuing to receive the fee farm rent, there seems to be no reason why that should not destroy the effect of her acts; for if she never intended any such thing, nor made that intention notorious, the making the leases and receiving the rents and profits, would not amount to a disseisin. That was so held, in the case of *Williams*, lessee of *Hughes* and another, v. *Thomas*,§ where it was established that the rents and profits must be received with intentions adverse to the party entitled, and by one claiming to put himself in his place.

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It was then urged that in point of fact, the defendants had had possession constantly, notwithstanding the leases, for they had always used the premises as the place where they threw the cinders and ashes from their works, and it was actually in their

† 1 Taunt. 578.

2 Roll. Rep. 284.

‡ Palm. 201; Cro. Jac. 659, and

§ 12 East, 141.

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occupation as an ash-bank at the time that the lease in question was made; and that completely negatives the notion of an ouster by Mrs. Chester, however she might, by leasing to the cottagers, have disturbed the defendant's possession.

On the whole, it was submitted, that there had been no disseisin effected by the leases of Mrs. Chester; and that, however the facts stated might have operated to afford to the defendants the remedy of disseisin at election, they did not therefore destroy or disturb their actual seisin, which was the sole point put in issue by the pleadings.

1817.
Feb. 4.

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Preston, in reply, contended that even a dispossession by Mrs. Chester, would be sufficient to entitle the plaintiffs to recover in this action of covenant; for the defendants had no right to suffer the possession to be incumbered, therefore it was necessary for them to prove that they were in possession. And they accordingly say that they were possessed, in fact, because they were actually constantly in the occupation of one part of the premises leased, inasmuch as it was used by them as an ash-bank:—But that could certainly not be considered as a possession against the person who actually occupied the house and garden, and gathered the fruit. The circumstance of their throwing the ashes from the works there, was not even a constructive possession of the cottages and gardens included in the leases, nor were they thrown there *animo clamandi*, but merely as any trespasser might have done.

Then it is said that Mrs. Chester did not mean to commit a disseisin, and that may be admitted; for she probably considered herself in possession of the premises as lady of the manor, thinking that they were part of the waste; still, however, the lease and possession by her lessees, gave her a seisin adverse to the title of the defendants, and her adverse title began from the leases: she had then an incipient right, which would in time be perfected into a good title. The case of *Blundell v. Baugh*, and the other cases of that class, arose entirely out of the question, Who was to be deemed the disseisor? Whether the lessee or lessor answered that character; and there was no question in *that case of the fact of a disseisin

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having been worked ; the only doubt was, by whom the disseisin was effected—the lessor or lessee.

It is not every lease which makes a disseisin ; for a lease by *cestui que* trust, or a mortgagor, or by a particular tenant, would not occasion a disseisin ; for in all those cases there is ground for the possession, and the possession is consistent with the seisin of the legal owner. The particular tenant can create a disseisin only by feoffment, or by what is equivalent to it. The disseisin gives the naked possession only, without right at first, and an entry might avoid it ; but sixty years' possession, or a fine and non-claim for five years, would convert the possession into a right. So, entry under a void grant would be a disseisin, and a title to the freehold might be acquired thereby, otherwise no length of possession would give such a title : every actual disseisin by entry gives a fee, whether it be *eo intuitu* or not. It is, in short, in cases where the lessor has no interest in the demised premises that his lease amounts to a disseisin. He becomes the reversioner of the lessee : for if there be a lease, there must be a lessor, and a reversion expectant on the term created by the lease. The lessor gains something, and he can acquire nothing short of the freehold ; for there is no particular estate in existence to which the lease can be referred. By the act of making the lease, he of necessity claims the freehold, and by the entry of his lessee the lessee acquires the possession, and the lessor is seized of the fee, and he becomes the only person able to convey *or deal with the seisin ; nor could the disseisee make any effectual conveyance during the continuance of the disseisin. To convey or assure any part of the property, he must make a previous entry, *Page v. Jourdan*.† On the other hand, the disseisor may encumber the estate, or transfer it. All such power would be acquired by the very act which Mrs. Chester has done,—an act by which a tortious possession of the fee is gained, and that without any intention on her part ; and even although she were under a mistake in conceiving that the premises were no part of the property conveyed by her ancestors. An act of disseisin cannot be qualified by the circumstance of mistake, or the fact of disavowal of intention. In either case

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† 1 Leon. 122.

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the act would be adverse to the true title, and it might always be questionable whether the demised premises were in point of fact part of the property granted, and therefore the acceptance of the fee-farm rent by her from the defendants might be referrible to other parts of the property, and would not necessarily be an admission of their right to the particular premises afterwards demised by her. A writ of assize might have been brought against Mrs. Chester, and if it had succeeded, her tenant would have been discharged from payment of rent, for want of privity of contract, *Webb v. Russell*.†

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He then urged that the cases which had been cited for the defendants, were either not applicable, or were not founded on the rules of law. The case of **Williams v. Thomas*, he insisted, was not law—that it was in direct opposition to *Goodright v. Forester*,‡ which was decided in the same Court two years before, and subsequently in the Exchequer Chamber; and that those two cases could not stand together. In *Williams v. Thomas*, the Court were surprised into that decision, and did not advert to the circumstance, that there could be an intrusion against any person except the Crown. In the anonymous case cited from *Salkeld*, Lord Holt's observation applies to mere trespassers, and not to a case like the present; and undoubtedly, where two persons are in possession at the same time, the law considers the possession to be in the person who has the right. On minute attention to the circumstances of the case of *Blundell v. Baugh*, that case, so far from conflicting with these general propositions on the subject of disseisin, will rather be found to support and confirm them (vid. Cro. Car. p. 304). Those propositions are of great importance to titles, and though taken from the old books are nevertheless law; and if overthrown, would render all those titles unsafe which depend on the long-established doctrine of disseisin and adverse possession, non-claim on fines, statutes of limitations, bar by warranty, &c.

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This case, (it was submitted) ought to be decided in the same manner as if the question were raised on an ejectment against the lessees—whether it be practicable, after 20 years' peaceable possession in *them, to oust them by ejectment? And if they

† 1 R. R. 725 (3 T. R. 393).

‡ 1 Taunt. 578.

have terms of years, Mrs. Chester must have the reversion.—In this instance, Mrs. Chester was, by her tenants, in possession—an actual *bonâ fide* and substantial possession—and the possession of her tenants was a seisin to her.

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Cur. adv. vult.

GRAHAM, Baron, now delivered the judgment of the Court, which, his Lordship stated, would be directed to the points which had been raised, as if the present action had been, in fact, an ejectment against the tenants claiming under Mrs. Chester's leases; although the frame of the issue, having been modelled on the covenant, did not necessarily involve all the questions which would have arisen in such an action, but had considerably narrowed the object of enquiry.

[Having stated the case at length, and pointed out the material facts on which either party relied]—The breach, said his Lordship, rests entirely on the effect of the leases by Mrs. Chester, and a load of knowledge has been brought forward in support of the position,—that they have necessarily the effect of a breach of the covenant,—which has very extensively burthened the case, and of which it is necessary that the question should be first disencumbered. It does not, however, seem necessary that the Court should, on the present occasion, enter into any controversy of the doctrine of Lord MANSFIELD, in the case of *Taylor v. Horde*.† That case *stands entirely on its own grounds; and so it must, until it may become necessary to dispute the doctrine there held, in some future case, when any such shall arise as may be in circumstances precisely similar. The principle on which that case was finally argued and decided, rests on a foundation not to be shaken. Whether Lord MANSFIELD went too far in the first case, the ultimate decision being long subsequent to the first argument, when the merits might have been more fully discussed, or not, I need not enquire. The decision, however, rests on principle, but as to whether a feoffment grounded on naked possession gives a fee, or not, it has been since determined, that a feoffment with livery did not operate as a disseisin. In the case of *Doe v. Horde*,‡ Mr. Justice

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† 1 Burr. 60.

‡ Cowp. 689.

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ASTON, reasoning on the doctrine of recoveries, held that none could be suffered without the concurrence of the party having the estate for life; and that the deed could only authorize a recovery with the consent of the tenant for life, and tenant in tail. Sir Robert Atkyns, however, having contrived to get possession, his levying a fine to make a tenant to the *præcipe*, was held a fraud for want of the concurrence of the jointress; and the estate went to the person entitled under the limitation. The cases would be stretched to an unsustainable latitude, if a tenant by sufferance, or tenant at will, making a lease, the mere act should be construed to amount to a disseisin. A manifest intention to oust must be clearly shewn. When the case in Palmer, 201, *Pousley v. Blackman*, *was mentioned, the Court was quite astonished. Why is it that the lease of a mortgagor is no disseisin? Because the mortgagee meant that he should keep the possession, and no intention of an ouster could be made apparent in such a case. There must be a manifest intention to oust, as well as an actual ouster; and we must look to see what it was the real intention of the party to do, before we hold the act done to be, in point of fact, a disseisin.

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In this case, the position that the mere circumstance of a lease by a stranger and entry by the lessee, whatever might be in fact the intention of the parties, in point of law, amounts to a disseisin, is the principle on which the whole argument on the part of the plaintiff rests. For that position the authority in Bro. Abr. tit. Disseisin, pl. 76, is relied on. Now that passage literally translated, is to this effect,—A. leases land of I. M. to me for years, rendering rent, the lessee enters and pays rent to the lessor, the lessor is a disseisor; the reason given is, because he who commands another to enter is a disseisor, which, take notice, is on account of the void lease. That comes to this, the lease, being void, is equivalent to a command to enter, but that refers wholly to the mode of effecting disseisin in those days, when it was often accompanied with force. That *dictum*, too, such as it is, is not quoted by Comyn; and therefore it was, probably, not then considered law, but if it be, still applying it to the present case, it establishes no more than this—that if Mrs.

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Chester commanded her lessee so to enter, she was a *disseisor.

Thus the whole of this elaborate doctrine rests on the most slender grounds; yet mark how this nucleus is rolled up into a mass of argument! Because a little cottage, by a blunder of Mrs. Chester, has been leased without right, that is magnified into a disseisin, which is to destroy the title of these defendants who claim under her deed. It would be quite absurd if such a thing should be suffered; and I am really ashamed of the pains I have taken in looking into the old cases which have been cited, to discover if they furnished any such doctrine as would support the argument used for the plaintiffs.

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Then let us see what a disseisin in law has been defined to be, and that may readily be shewn by a few passages from the old books. Lord Coke has adopted the definition of Bracton† and Fleta (the Mirror),‡ “*Disseisina* is a putting out of a man out of seisin, and ever implyeth a wrong; but dispossessing or ejectment is a putting out of possession, and may bee by right or by wrong.” Then he comes to his illustration, “*Omnis disseisina est transgressio, sed non omnis transgressio *est disseisina. Si eo animo forté ingrediatur* (now that word *forté* is extremely important) *fundum alienum non quod sibi usurpet tenementum vel jura, non facit disseisinam sed transgressionem, &c. Quærendum est a judice quo animo hoc fecerit, &c.*” Then adopting the criterion *quærendum est quo animo*, let us see what was the intention of the parties in doing the act which has created the present question; and that it is easy to collect from the circumstances of the case—[His Lordship took a brief review of the facts.]—Then the argument used for the defendants was properly this: Could Mrs. Chester have intended to disseise the plaintiffs, when she and her successors have ever since been receiving the 5s. rent from them? She had, in fact, no more

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† Bracton, in l. 4, fo. 161, 162, has enumerated very many various modes of disseisin, wherein the main distinctions taken between disseisin and trespass appear to be founded on the *criteria* of the nature and character of the acts of the disseisor—as, whether the putting out were *violenter, injusté, et sine judicio*,—and so as to a keeping out, if the possession had

been vacant, whether it were *animo clamandi*, or *contra voluntatem possidentis*.

‡ Co. Lit. 153 b. [Coke of course did not commit the blunder of supposing the Mirror to be the same book as Fleta. The position of the words “the Mirror” in Price’s text is unintelligible.—F. P.]

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idea of committing a disseisin than a robbery. But then it is said, on the other side, that we are not permitted to seek for any such explanation of her acts from her intentions, however obvious, because those acts cannot be so qualified—for that their effect in law is not to be explained away; and that is really the doctrine which the common sense of the Court is called on to adopt. Now nothing could be more absurd in us, than to hold such a doctrine at this time of day; but the old books do not, in fact, afford any pretence for the argument, and the very definitions which I have cited clearly shew it.

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Then let us go still farther: I will suppose, for a moment, that Mrs. Chester was a stranger; and even then I would say, that this act of hers would *not have operated as a disseisin in the absence of intention. Now Mrs. Chester was by no means a stranger, and her acts are not to be construed so rigorously. But if we add to all this the fact of her acknowledging the plaintiff's title, by receiving suit and service, it becomes so clear that she did not mean even to dispossess them, as to leave not a shadow of doubt on the effect of this act.

If, however, Mrs. Chester should at any time afterwards have insisted on any claim which the consequences and legal operation of such an act might, under any other circumstances, have given her: an answer to it, is to be found at hand in the doctrine of estoppel. In Co. Lit. 352 a & b it is said there are three kinds of estoppel: by matter of record—by matter in writing—by matter in *pais*. Two of those three are directly applicable here: there is no matter of record in this case certainly, but there is matter of writing, because Mrs. Chester is in privity of feoffor, and she would be concluded by her deed. Then there is also this very case, which might have served to illustrate the effect of matter in *pais*—her continued acceptance of rent from the party against whom she would have to make good her claim.

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But let us admit that this act of the lease by Mrs. Chester were, in point of law, a tortious ouster by her. In that case it is clear the tenant could claim nothing but his term. Mrs. Chester would then be the disseisor, having the reversion *in a tortious fee: and her acceptance of rent from the defendants as her

tenants, would in such a case have the effect of remitting them to their ancient estate.

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Then again—Suppose Mrs. Chester to be in the situation of a person making claim, after entry tolled, as heir of a disseisor. There is a passage in the text of Littleton (sect. 692), which clearly shows that she might then have disclaimed, and the tenant might lawfully enter because of the disclaimer. Now that position, as applied to this case, founded on the fact of the acceptance of the freehold rent up to the latest moment, which is an express disclaimer, is an argument against any claim under what has been called this disseisin, which is really past the power of answer.

On the whole, therefore, it appears to me, that the arguments used in favour of these plaintiffs, whose case rests on the slightest possible grounds,—that this lease of Mrs. Chester operated as a disseisin,—are totally without foundation: But then, even admitting that, under the circumstances of this case, there had been a disseisin in fact, it is gone, purged, and in all respects waived by the subsequent acts of disclaimer.

I do not charge my brothers with concurring in all that I have said in expressing my sentiments on this case, but I believe I may say that they in effect entertain the same opinion.

In another point of view, if this were a disseisin, as has been contended, I am of opinion that the defendants would still be entitled to their verdict, for there has not been any breach of this covenant; for there is no defect in point of fact in the general title. What can a man be supposed to covenant against beyond the validity of title? and most assuredly not against these surreptitious pocket leases. It is enough that a man covenant fairly against defects in his title, but he is not to be bound by such ridiculous rigour as these plaintiffs would hold him to. Suppose that Mrs. Chester had brought an ejectment, what could she have said to the objection, that she had received rent? Yet is this pretended possession of paper and packthread to be called by the tremendous name of disseisin; and on that the plaintiffs would induce the Court to set aside the judgment obtained by the defendants, and to which they are clearly entitled.

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WEARE.

Wood, Baron, concurred :

I will say one word only on the last point : I am quite clear that there has been no breach of covenant in this case. The action of covenant only extends to the consequence of legal acts, and the reason is to be found in the case of *Hayes v. Bickerstaff*,† that the law shall never judge that a man covenants against the wrongful acts of strangers.

Postea to the defendants.

EXCH. EASTER TERM.

1817.
April 25.

HOMAN AND ANOTHER v. MOORE AND WIFE, MILLER,
MALING, HUNTER, AND GRANT.

[5]

(4 Price, 5—7.)

A lessee proceeded against by ejectment, and who has received notice from a claimant disputing his landlord's title not to pay him any more rent, and has been threatened with a distress by his landlord if he does not, cannot sustain an injunction to restrain the distress ; for he is not permitted by such means to bring his landlord's title into dispute.

MARTIN, and *Wakefield*, shewed cause on the merits, against the order *nisi* for dissolving the injunction which had been obtained in this case, to restrain the defendants Maling and Grant from proceeding in actions of ejectment commenced against the plaintiffs ;—and defendants Moore and wife and Miller, from distraining for rent, until a dispute as to the title of the plaintiff's lessor, should be decided.

The plaintiff's bill stated, in substance,—that in the year 1805 certain persons, from whom the defendants Moore and wife, and Miller, derived title, fraudulently pretending to be seised in fee of the premises, let them to plaintiffs for a term of twenty-one years ;—that in July, 1814, they received a notice from the defendants Maling, and Hunter (since dead) and Grant, trustees of Maling, claiming title to the premises, addressed to them as the tenants in possession, requiring them to give up the possession at the end of the year, and in the meantime not to pay any

† Vaughan, 121 ; and see the cases in note 10 to *Wotton v. Hall*, Saund. 181 a.

rent to any other person ; that Moore and Miller had refused to indemnify them against the payment of rent to them, and threatened to distrain for arrears ; and that the defendants Hunter and Grant had commenced actions of ejectment to recover the possession : and therefore plaintiffs prayed, &c.

HOMAN
v.
MOORE.

The answer of Maling and Grant stated,—that in September, 1707, a former proprietor of the premises demised them for a term of ninety-nine years to Richard Frankwell, and that defendants Moore, wife, and Miller, got into possession of the said premises under the said Frankwell, before the year 1806, when the said term expired, and still continued in such possession ;—that plaintiff Maling became seised of a certain share in the said premises : and denied that Moore and wife and Miller had any right or title to the said premises, except through the said Frankwell, and by holding over after the expiration of the said term ; believing it to be true that a fraud had been practised on the plaintiffs.

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The answer of Moore and wife and Miller denied fraud ; and alleged, that complainants well knew their title to and interest in the premises, at the time when the lease was made ; and denied altogether the title of Maling and Grant, and the right of the former to convey to the latter, claiming for themselves an absolute interest in the said premises from long and uninterrupted possession of themselves and those under whom they claimed ; and admitted their intention to distrain.

Under these circumstances, it was submitted as cause, that the right of the defendants Moore and wife, and Miller, had ceased, and therefore the plaintiffs were entitled to pray that the injunction as to payment of the rents, might be continued, till *the title had been tried at law by the result of the ejectments pending.

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[RICHARDS, Chief Baron : On what equity ? They are your landlords.]

It is shown that they have ceased to be landlords, for the term has expired ; and that a gross fraud was practised by those under whom they derive title, in letting the premises for a term beyond their own right of possession.

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v.
MOORF.

RICHARDS, Chief Baron :

Still they are the plaintiffs' landlords; and the tenants cannot be relieved in this way, even if they have demised to them premises which they had no right to let. They cannot so bring their landlords' title into dispute.

Dauncey, and Roots, contra.

Per CURIAM :

Injunction dissolved.

1817.
May 7.

BODENHAM AND OTHERS v. BENNETT AND OTHERS.†
(4 Price, 31—35.)

[31]

Where a valuable bank parcel sent by a stage coach is lost, and it is proved that on the arrival of the coach, the driver was in liquor, and that the bookkeeper, who saw the entry of it in the way-bill, thinking that the coachman (as was the custom) had the parcel about his person, did not ask him about it, or look into the coach for it: Held, to be a loss arising from gross negligence, and that the proprietors were liable as carriers for the value, notwithstanding they had put up the usual notice in their office, disclaiming liability to make good losses beyond 5*l.*

CASE against common carriers, for losing a parcel. Plea, Not guilty. At the trial at the last Hereford Summer Assizes, before Richards, Baron, and a special jury, a verdict was found for the plaintiffs, for 347*l.* 11*s.* The case was thus :

The defendants were proprietors of a coach which ran from Hereford to Brecon, and thence to Carmarthen, and had given the usual notice that they would not be liable for parcels above 5*l.* unless insured and paid for accordingly. The plaintiffs were bankers at Hereford, and were in the habit of sending parcels of Welch notes to Messrs. Wilkins, bankers at Brecon. These parcels were always sealed in a particular manner; and the bookkeeper knew that they contained Welch notes. On the 17th August, 1815, the plaintiffs' clerk took a parcel, sealed in the usual manner, containing notes to the amount of 347*l.* 11*s.*, to the coach-office, to go by the coach to Brecon on the following morning. He paid a halfpenny for carriage and booking: no insurance was demanded, or paid. On the following morning the parcel was entered in the way-bill, and put in the back seat

† See the authorities referred to 1 Q. B. 373, 10 R. 85.
in *Shaw v. G. W. Ry. Co.* '94,

of the coach. There were two other parcels also entered in the way-bill. There were no inside passengers when the coach left Hereford. When the coach arrived at Brecon, the bookkeeper there, who usually unloaded the coach, received the way-bill, and took the two other parcels *out of the front seat of the coach; he did not look for the bank parcel, because the coachman usually carried it in his side-pocket. The coachman, on that day, was intoxicated, but not so as to be unable to attend to his business. After waiting a quarter of an hour at Brecon, the coach proceeded on to Carmarthen.

BODENHAM
*
BENNETT.

[*32]

The learned Judge stated to the jury the common-law liability of carriers, and that they might stipulate to restrain it by notice. That they had given such a notice in this case, and therefore the question was, whether there had been gross negligence in the carrying of this parcel. He then detailed the evidence to the jury, who found for the plaintiff to the amount of the notes.

Taunton moved for a new trial.

Dauncey, and *Peake*, showed cause; and cited *Ellis v. Turner*.†

Taunton, *Owen* and *Puller*, supported the rule, and cited *Tyly v. Morris*,‡ *Gibbon v. Paynton*,§ *Harris v. Packwood*,|| *Nicholson v. Willan*,¶ *Beck v. Evans*,†† *Levi v. Waterhouse*.‡‡

GRAHAM, Baron :

I do not think there is much *difficulty in this case, as the law now stands. By the old law, the carrier was bound to take the strictest care of the property entrusted to him; but of late it has been conceded, particularly in *Nicholson v. Willan*, where Lord ELLENBOROUGH gave up his former opinion, that the liability of the carrier may be qualified, and that he may require

[*33]

† 5 R. R. 441 (8 T. R. 531).

‡ Carth. 485.

§ 4 Burr. 2298.

¶ 15 R. R. 755 (3 Taunt. 264).

¶ 15 R. R. 745 (5 East, 507).

†† 14 R. R. 340 (16 East, 244).

‡‡ 16 R. R. 720 (1 Price, 280).

BODENHAM an additional premium for the risk he runs ; but yet he must
v.
BENNETT. take due care of parcels, and if he neglects them, he is still liable. But supposing he is only chargeable for gross negligence : let us see in this case whether there has been that gross negligence. Observe the nature of the parcel sent from Bodenham to Wilkins ; such parcels had been often sent, and the moment the parcel was delivered, all persons in the defendant's employ must have known that it was a parcel of value. But when the coachman comes to Brecon, he gives the way-bill to Peters, who sees from the bill that it is a package sent in the usual way of such valuables, and directed to the bankers. Peters says, "I took two parcels out of the coach ; I did not look for the other parcel." Why not ?—"I concluded it was carried by the coachman, as he usually carried such parcels." Now it is clear the coachman was not in a situation to take care of it ; and Peters says he was a drunken man. He ought to have asked the coachman for it, when he saw he was in liquor. So strongly am I of opinion that this was gross negligence, that I think it was the very way to facilitate theft. I do not say it was done for that purpose ; but I cannot help thinking that the parcel was stolen between Brecon and Carmarthen. I agree with the defendants' counsel, *that the defendants would not have been liable if ordinary diligence had been used ; but being strongly of opinion there was gross negligence in this case, I think the verdict was right.

[*34]

Wood, Baron :

I am of the same opinion. I see no ground to disturb the verdict. By the common law, the carrier was liable for losses arising from accident or robbery ; nay, from irresistible force. The case of *Morse v. Shuc*,† pressed extremely hard on common carriers. Then special conditions were introduced, for the purpose of protecting carriers from extraordinary events ; but they were not meant to exempt them from due and ordinary care. It cannot be supposed that people would entrust their goods to carriers on such terms. It only means, that they will not be answerable for extraordinary events : but we need not, in this case, lay down that rule. Here has been gross negligence, and in all

† 1 Ventr. 190, 238.

cases of that sort carriers are liable. The parcel was delivered at Hereford; it was entered in the way-bill; for any thing that appears, it gets to Brecon, where it ought to have been delivered. The carrier does not merely engage safely to carry and convey; he also engages safely to deliver. Have they taken care to deliver? Nobody looks for it. The bookkeeper saw it down in the way-bill: he knew it was to be delivered at Brecon, but never looks for it,—not the least in the world. He says, “I trusted to the coachman:” he, I suppose, would say, “I trusted to the bookkeeper.” It is plain *they never cared any thing about it. What can be grosser negligence? In all probability the parcel was left in the coach and went on to Carmarthen, and was lost there or in its passage. If the defendants let it go farther than Brecon, according to *Ellis v. Turner*, they are liable. Put it any way, I see no ground for disturbing the verdict.

BODENHAM
v.
BENNETT.

[*35]

GARROW, Baron:

This is a case of considerable importance to the public. I entirely agree with the law as laid down by my learned brothers, and it is unnecessary for me to add any thing to it. Every body who has had any thing to do with carriers, must know, that if this case had received a contrary decision they would have had no security whatever. The carriers would have said, “You may enter into my lottery of a common carrier, where there are a hundred blanks to a prize,—where it is a hundred to one if your parcel arrives safe.” But this case will teach them that it is their interest to employ persons capable of attending to their duty. I think the law was distinctly laid down to the jury, and that it was a question of fact proper for their consideration. Had I been one of the jury, I should have found that there was gross negligence,—extreme negligence. If the verdict had been the other way, I should certainly have been of opinion that there ought to have been a new trial.

Rule discharged.

HARRISON *v.* KING.

IN ERROR.

(4 Price, 46—47.)

[Reported from 7 Taunt., at p. 524, *ante.*]

1817.
May 8.
*Exchequer
Chamber.*

EXCH. TRINITY TERM.

HART AND ANOTHER *v.* M'NAMARA AND ANOTHER.†

(4 Price, 154, n.)

1817.
[154, n.]

ACTION for the price of rum sold by plaintiff. The defence was, that the rum was adulterated. To prove the adulteration, the record of condemnation of the rum was offered in evidence; and to connect the plaintiffs with the cause of condemnation, a record was offered in evidence of proceedings by the Crown against the defendant for penalties, in which defendant was convicted.

GIBBS, Ch. J. held, that the record of condemnation was admissible, being *in rem*, but he refused to admit the record of conviction for penalties, stating, that as it was *in personam*, it was not evidence in any case where the parties were different.

HAMIL AND OTHERS *v.* STOKES AND OTHERS.‡

(Daniell, Exch. Eq. 207; S. C. 4 Price, 161—167.)

1817.
*Exchequer
Chamber.*

Return of premium on partnership ordered under circumstances where there was a substantial failure of consideration caused by the action of the partner receiving the premium.

THE suit was by Hamil (a bankrupt) and the assignees under his commission of bankruptcy against Stokes (also a bankrupt),

† Referred to in judgment of BOWEN, L. J. in *De Mora v. Concha*, (1885) 29 Ch. D. 268, 301; 54 L. J. Ch. 532, 538.—R. C.
‡ Partnership Act, 1890, s. 40; *Belfield v. Bourne*, '94, 1 Ch. 521, 8 R. 61, 63 L. J. Ch. 104.

and the assignees under his commission of bankruptcy, praying the cancelment of a bond given by Hamil, and the return of money paid by him for a premium on entering into a partnership with Stokes. The facts sufficiently appear from the judgment of—

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v.
STOKES.

RICHARDS, Chief Baron :

[24]

If this had been a case merely between the plaintiffs and Stokes, no man could have entertained a doubt respecting it. Here is a man who, being an attorney, prevails upon another who is not an attorney to enter into an agreement that, when he is, he shall become a partner with him for five years ; and for this he is to pay one thousand guineas. At the end of the thirteen months the partnership is determined, and the whole benefit of it lost to the plaintiff, and that by the act of Stokes, in suing out a commission of bankrupt against him. When Stokes admits that he procured a commission against Hamil, he admits that which no man of moral feeling *can hear without indignation. Courts of equity would be a nuisance instead of a benefit, if they did not relieve a plaintiff from an engagement which the conduct of the defendant had determined.

[*25]

The assignees are right in endeavouring to procure what they can for the benefit of the estate : but they and Mr. Price † are subject to the same equity as Stokes was liable to, and must therefore stand in the same situation.

* * * * *

[The COURT accordingly ordered the cancelment of the bond ; and debts to be proved on either side on the footing that the money already received in respect of the consideration for the partnership should be refunded, except so far as should be commensurate with the period of the actual duration of the partnership.]

† Mr. Price, to whom the bond for signed, was also a defendant.
the unpaid premium had been as-

1817.
June 13.

ATTORNEY-GENERAL *v.* SIR C. H. COOTE, Bt.

(4 Price, 183—189.)

[183]

A statute imposing a duty on the property of persons residing in Great Britain, applies to persons residing there for any length of time, however short, although they may, at the same time, have a more permanent residence elsewhere.

An exemption of persons coming to reside "for some temporary purpose only, and not with any view or intent of establishing a residence therein, and who shall not have actually resided in Great Britain for the period of six successive calendar months," does not include a person taking a house in London, and furnishing and residing in it for a less period than six months at any one time, and who then goes elsewhere with his establishment and resides for the remainder of the year there, leaving behind him some one merely to take care of the house.

Such a person is therefore within the Act of the 46th Geo. III. c. 65; but not within the exemption of the 51st section.

THIS was an information against the defendant for omitting to make a return of his property, as required by the Property Tax Act, (46 Geo. III. c. 65,†) and the question was, on this application, to set aside the verdict found for the Crown, whether he was liable to the duties thereby imposed, under the following admitted circumstances:

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That the defendant was in receipt, in Great Britain, of profits

† Sched. D. charges a duty of 1s. in the pound "on the annual profits or gains arising or accruing to any person or persons residing in Great Britain, from any kind of property whatever, whether situate in Great Britain or elsewhere."‡

By sect. 51, it is enacted, "That no person who shall, on or after the passing of this Act, actually be in Great Britain for some temporary purpose only, and not with any view or intent of establishing his or her residence therein, and who shall not actually have resided in Great Britain for the period of six successive calendar months, shall be charged

with the said duties mentioned to be charged in Sched. D. as a person residing in Great Britain, in respect of their profits or gains received from or out of any possessions in Ireland, or any other of his Majesty's dominions or any foreign possessions, or from securities in (&c.); but nevertheless, every such person shall, after every such six months residence therein, be chargeable for the same from the commencement of the year in which such person shall have been resident in Great Britain, or if not so resident, then for the period of his or her having so come into Great Britain."§

‡ These words (substituting "United Kingdom" for "Great Britain") are reproduced in Schedule D. to the Act 16 & 17 Vict. c. 34.—R. C.

§ There is no provision worded in similar language in the modern Acts relating to property tax.—R. C.

and gains arising from certain possessions in Ireland belonging to him, and was duly required by the assessor to make a return for 1814, as laid in the information, and incurred the penalties as claimed thereby, if the Court shall be of opinion that he was liable to make such return on the facts of this case.

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GENERAL
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COOTE, Bart.

That the defendant, who was born in Ireland, and resided while an infant with his mother Mrs. Cook, in Great Britain, where he was educated, came of age in December, 1812, and continued to live with her until the 24th June, 1813, when he bought and took possession of his present dwelling house in Connaught Place, which he furnished. That he had continued in possession thereof so furnished up to the present time; and had been assessed for the said house, to all rates and taxes for the year 1814, and subsequent years, but not for any establishment under the assessed taxes.

That during the period of his residence in Connaught Place, from the time of his purchase up to the present time, he never lived there, or elsewhere in Great Britain, for the period of six successive calendar months, but usually went to Ireland to his place of residence there, after residing for 10 weeks in Connaught place, from whence he did not return for the space of nine months, leaving, during such his absence, a woman servant to take care of the house, the remainder of his establishment *going with him to Ireland, and returning with him from thence, when he returned to his residence in Connaught Place.

[*185]

Dauncey and *Nolan* now shewed cause, relying wholly on the construction of the words of the statute with reference to its object, and they cited the case of *Rex v. Sargent*,† to shew that a residence of the shortest duration, where the house had been taken for a year, had been held to be such a residence as would qualify a party for an office required to be filled by a resident.

Martin and *Maule* in support of the rule, rested the defendant's case on the facts, which they contended brought him

† 5 T. R. 466.

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within the exemption of the 51st sect. ; submitting, that the clause was not confined to a residence for a temporary purpose, but extended to all cases where the party resided here without intent of establishing a residence in Great Britain. They insisted, therefore, that to bring the defendant within the Act, it was necessary to shew him domiciled in England and not in Ireland ; whereas, there could be no doubt that, under the circumstances of this case, the defendant was domiciled in Ireland, and not in Great Britain ; and they cited many authorities in support of that proposition, all of which are to be found in the case of *Somerville v. Somerville* ; † but the question of domicile, the Court afterwards said, did not apply in this case.

[186]

They then submitted, that the various sections of the Act explained the meaning in which the Legislature had used the terms “ ordinary residence.” Sect. 50, for instance, was the converse of sect. 51. There the Act charged persons ordinarily residing in Great Britain, notwithstanding any temporary absence abroad, clearly marking the intention to fix ordinary established residents with the duty, and that however short their actual residence might be. So the 41st Geo. III. c. 62, exempts persons ordinarily resident in Ireland from the income tax, (39th Geo. III. c. 13,) as with relation to income in Ireland ; and also from the duties on servants, &c. imposed by the 38th Geo. III. c. 41, and so had various other statutes, thus furnishing a legislative exposition of the meaning of the Act, shewing that time was not considered an ingredient in an ordinary residence ; all the purposes of a person coming to reside in Great Britain for so short a time as the defendant resided here, must be of a temporary nature. The *King v. Sargent* was a case where the question was, merely, whether the residence was of such a particular nature as was sufficient to qualify a person for the office of bailiff ; but such a residence as Sargent’s would not have brought him within this Act.

Dauncey, about to reply, was stopped by

RICHARDS, Chief Baron :

The Court are of opinion that this verdict must stand. In

† 15 R. R. 155 (5 Ves. 750).

considering this question, I shall give my opinion as if *I were one of a jury deciding according to the evidence before the Court, on the question, whether the defendant came to reside in London for a temporary purpose or not; and that question we must also consider with a view to the object of the Act. The fact of the defendant's domicile has nothing to do with the question, nor has the time of his residence any effect on the construction of the words of the Act; for if the defendant came here for the purpose of establishing a residence, it were enough, although he should reside here only two weeks. The sole question is, whether he came here to reside with such a view as exempts him. [His Lordship detailed the facts of the case.] I am of opinion that the defendant is clearly within the Act. *Primâ facie*, he is liable. Then it is incumbent on him to shew that he is within the exemption. I think he has not done so; and had I been one of the jurymen I should have given the same verdict as has been found, and therefore I think it ought to stand. It is a strong fact, that the same servants who lived with him in town went to Ireland, and returned with him.

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[*187]

GRAHAM, Baron :

The verdict is found on very plain facts, and I think they shew that the defendant did not reside here for a temporary purpose. The question of domicile goes beyond the case. No doubt he was domiciled in Ireland, and so he might have been if he had resided here 20 years; but the question turns on the plain language of the Act, and I think the intention of the Legislature quite clear. If a man dies two days after forming *his establishment, is he not within the Act? or may any man come here and stop till within a week of the six months, and then go to Ireland, and return for the purpose of avoiding the duty? Under the circumstances I think it is quite impossible to say that the residence of the defendant in England was occasional, or for a temporary purpose. At any period of the year he might have come to Connaught Place, where he would have found his house ready for him.

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WOOD, Baron, of the same opinion :

No doubt the defendant is liable under the Act, unless he

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C.
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COOTE, Bart.

brings himself within the exemption. That, therefore, is the single question. If the defendant had come to reside in London for a temporary purpose, it might have been so stated; but it is clear that his residence here, while it continued, was for all manner of purposes. The difference in language between the 50th and 51st sections is very material to the consideration of this case. Had the words been "occasional residence," or had there been no other words, there might have been considerable doubt. It is no uncommon thing for a gentleman to have two permanent residences at the same time, in either of which he may establish his abode at any period, and for any length of time. This is just such a case: the defendant has two residences, and they are equally permanent. There is no pretence therefore for contending, that he comes within the exemption. If this were a temporary residence, he would probably change it sometimes, but in fact it is his own house.

[189] GARROW, Baron :

Although the case has been argued with considerable ingenuity and ability, I have not been able to entertain a doubt on it for a moment. If it were a hard case, the Court could not take notice of that; but I think it is quite the other way. In the exigencies of the country this tax was imposed, and its object was to relieve the subject by throwing the great weight of it on those who were most capable of sustaining it. Is then a man, having a magnificent establishment, to be permitted to evade this tax on property, by continuing to reside on it just so long as may be sufficient to bring him within the case to which it is argued this exemption applies? And on the other hand, a person coming for a purpose really temporary, and is obliged from misfortune, perhaps, to remain over the period of six months, is to be compelled to pay! It would be defeating the very wholesome object of the Act, to put such a construction on this clause. The preceding clause (sect. 50,) is very explanatory of this section when the words are read with a regard to the object of the statute.

Rule discharged.

GOUGH v. DAVIES AND GIBBONS.

(4 Price, 200—215.)

1817.
June 17.

[200]

A person depositing money with bankers, and taking their accountable receipts, does not, by continuing to leave his money in the bank after a dissolution of the original firm and the constitution of a new one, which consists of some of the members of the old bank and of other persons, discharge the former partners who have gone out, although he receives interest regularly from the new firm, gives them no notice, and continues to transact business with them in the common course, and that for a period of four years, and until they become insolvent.

Nor are those circumstances sufficiently strong to justify such a case being left to a jury.—GARROW, B. *dubitante*.

THIS was an action of assumpsit, in which the defendant Gibbons having pleaded his bankruptcy, a *nolle prosequi* was entered as to him, and Davies pleaded the general issue. A verdict was found for the defendant at the Stafford Lent Assizes, 1817, under the direction of Mr. J. Parke, who *left it to the jury, telling them that there were two questions of fact for their consideration; † 1st, Whether the plaintiff assented to the transfer of the credit from the old firm to the new? 2ndly, Whether the defendant consented to take back the credit on himself? In the former case he directed verdict for the defendant; in the latter, for the plaintiff. His Lordship had expressed his own opinion to be, that under the circumstances of this case, the verdict ought to be for the defendant; holding that the plaintiff had impliedly assented to a transfer of the credit, and that an express assent was not necessary; and that the accountable receipts were to be considered merely as evidence of the payment of the money, and not as specific securities, having the same effect only as the entries of the same sums in the banker's books would have had. In the following Easter Term, a rule having been obtained for setting it aside, the facts were stated, by the desire of the Court, in the following case:—

[*201]

Thomas Gibbons, the elder, deceased, John Davies, and Thomas Gibbons, the younger, (the two defendants in this record,) carried on business as bankers, in partnership, at Wolverhampton, in Staffordshire, from the 1st October, 1808, to

† See the statement in the case, *infra*, p. 701.

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 GIBBONS.

the 10th October, 1811, under the name of "The Wolverhampton Old Bank."

[*202]

At the latter period, the partnership above mentioned was dissolved, and a new partnership *was formed between the said Thomas Gibbons the elder, Thomas Gibbons jun. (the defendant,) and his brothers, John and Benjamin Gibbons. Notice of the dissolution of the old, and the establishment of the new partnership, signed by all the parties, was published in the *London Gazette* of November 12th, 1811;† and the new partnership continued to carry on business, under the same name of "The Wolverhampton Old Bank," till Thomas Gibbons the elder, whose name stood first both on the old and new partnership, died, which was in June, 1813; and the survivors continued to carry on the business, under the same name, till the month of March, 1816, when the partners became bankrupts. The plaintiff, who has a place within two miles of Wolverhampton, which he comes to occasionally, but resides chiefly at another seat, about ten miles distant from Wolverhampton, from the month of March, 1809, was in the habit of depositing money from time to time in the bank at Wolverhampton, for which he received unstamped receipts; and at the period of the dissolution of the old partnership, he had in his possession several of such their receipts for such money so deposited, amounting to the sum of *2,213*l.* 10*s.* 8*d.*; and which receipts he still holds, never having had any securities substituted. The form of most of those receipts was as follows:

[*203]

"Wolverhampton Old Bank, 1st March, 1809.

No. 263.

RECEIVED of John Gough, Esq. two hundred and twenty pounds, to account for with interest.

220*l.*

For Thos. Gibbons, John Davies, and
 Thos. Gibbons, jun.

R. BIRCH."

† The terms of the advertisement (which the Court required to know during the discussion) were as follows:—"Notice is hereby given, That the partnership between [the parties, naming them individually] expires upon the 10th day of October

inst.; and that the bank will be continued by [the same parties, substituting the name of Benjamin Gibbons for John Davies] under the firm of," &c.

[Signed by each of the parties.]

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The interest allowed by the bank upon these deposits was four per cent. being the same rate of interest as that allowed by them on deposits to their customers in general; and some few of the receipts expressed the rate of interest. At the dissolution of the old partnership, the balance of the plaintiff's account was brought forward into the concerns of the new firm. This was done without consulting him; but he knew of the dissolution, and continued to deposit money in the bank after the new partnership commenced, for which he had the accountable receipts of the new firm sent to him for such deposits from time to time; and each time a balance was struck, the interest upon the whole sum, as well that part of it which was deposited before, as that part which was deposited after the new partnership was formed, was calculated as upon one aggregate sum without distinction; and when the new firm became bankrupts, the plaintiff held their accountable receipts for 1,941*l.* 13*s.* 6*d.*, exclusive of the receipts above mentioned for the old balance of 2,213*l.* 10*s.* 8*d.*, as appeared by the plaintiff's account, as it *stood at the bank at the time of the dissolution; and that balance was due from the firm of Gibbons, Davies, and Gibbons, in which the defendant was a partner at the time of the dissolution. The account is then brought forward by the late firm, leaving a balance of 5,018*l.* 14*s.* 9*d.* in favour of the plaintiff.

[*204]

The plaintiff, at various times after the dissolution, applied for and received several sums at several times, from the new partnership, as interest, which was calculated upon the whole account, without distinction, including the balance due at the dissolution of the old partnership; and he acknowledged the receipts of sums due for interest, by letters addressed to Messrs. Gibbons & Co. bankers, Wolverhampton, without objecting to the manner in which the accounts were kept or the interest calculated; and in 1814, an account was rendered him, by his desire, which was headed,—“Received of John Gough, esq. by Gibbons & Co.” Then follow the receipts, amounting to 3,128*l.* 10*s.* 8*d.*

There was also received, December 18th, 450*l.* which was requested not to be put in the general account, with the following remark “because I expected I should want it in a few days.” Those words were in the plaintiff's hand-writing upon the paper

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containing the said account. On the 4th May, 1816, the solicitor for the plaintiff attended a meeting under the commission of bankruptcy, and there met John Davies, the defendant, and stated *to him that the plaintiff had a demand against him and company; and shewed him an account drawn out by himself, (the solicitor) of "Accountable Receipts of the Wolverhampton Old Bank, of Thomas Gibbons, John Davies and Thomas Gibbons, jun. held by Mr. Gough," amounting to 2,213*l.* 10*s.* 8*d.* John Davies said, he knew of it before; that he had made various applications to the bankrupts to be exonerated from all claim or risk on account of that demand; that he considered he had been used very ill by them; that he had come into the country previous to the last Christmas, for the purpose of getting exonerated for the claims which might be made by Mr Gough; that he then suspected the affairs of the bank were in a precarious state, and had threatened them, unless he was exonerated, that he would make a personal application to Mr. Gough, to call in his money; in consequence of which, he had obtained a bond of indemnity from Benjamin Gibbons, sen. to secure him against that demand, and some outstanding demands which existed against the partnerships of which he had been a member at the time of the dissolution; that it was his disposition to pay all his debts honourably, and he held himself bound to pay such demand as the plaintiff might have against him, and all other demands outstanding against him, as far as his property would go. The solicitor for the plaintiff said, that John Davies the defendant, had been very ill used, and promised to use his influence with the plaintiff to obtain him every facility to recover his money from the other parties, having understood John Davies to have stated at that *time, that Thomas Gibbons, sen. (whose name stood first in the old partnership,) had left a large property more than sufficient to pay all the debts. On the 10th June in the same year, this action being then commenced, the solicitor for the plaintiff again met John Davies, attended by his solicitor, and also by the solicitor and a friend on behalf of Benjamin Gibbons, the surety, when the account above stated, and shewn to John Davies on the 4th May, was again exhibited, and its correctness as to sums and dates, admitted by Mr. Davies and all parties,

[*206]

and the following proposition was put into writing by the solicitor for Mr. Gibbons, and left with the plaintiff's solicitor, to be submitted to the plaintiff, and was ultimately assented to by him ; but after a long correspondence and negotiation thereon, nothing was done in consequence of such proposal.

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“ Mr. Benjamin Gibbons, sen. is possessed of three shares in the Staffordshire and Worcestershire Canal, of the value of 2,000*l.* which Mr. Pearson, on behalf of Mr. Gibbons, proposes shall be assigned to or deposited with Mr. Gough, together with his bond, as a collateral security for the sum of 2,039*l.* 10*s.* 8*d.* and interest, (for which he stands a guarantee to Captain Davies, under a bond of indemnity dated 19th January last,) to be payable at the end of twelve months from Midsummer next. If this proposition is accepted, Mr. Gough not to be precluded from proceeding against any other parties for payment of his money in the mean while.—11th June, 1816.”

The learned Judge before whom the cause was tried, left it to the jury to consider whether the plaintiff had not assented to making the new firm his debtors, observing, that with respect to the communication since the bankruptcy with the defendant, that he did not know there had been any subsequent dealings between the parties, and, therefore it was for them to say whether if the plaintiff had assented to the transfer of the debt, the defendant had agreed to take it upon himself again.

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The jury found a verdict for the defendants.

Dauncey and *Petit*, in support of the verdict, now shewed cause :

They submitted, that a debt or credit might be transferred at law, and it having been said that it would require strong evidence to establish such a transfer, admits that it may be matter of evidence. It was established in this case by the verdict of the jury, with the approbation of the Judge. Then having brought together the material facts—they submitted, that as at the trial much reliance was placed by the plaintiff on the effect of the facts, and of the several conversations proved, as tending to

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elucidate them, all which were before the jury, their decision was complete and conclusive.

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In the case of *Browning v. Stallard*,† where one had sold and delivered goods to another, who transferred them to a third person, (the defendant,) which was mentioned to the seller when he *called for his money in the presence of the defendant; that was held to be a transfer of the goods, and gave the seller a right to recover against such third person.

In the case of *Surtees v. Hubbard*,‡ Lord ELLENBOROUGH held expressly, that though choses in action are generally not assignable, yet where a party entitled to money assigns over his interest to another, although the debtor may refuse his assent, any thing like an assent on the part of the holder of the money would suffice to maintain an action against him for money had and received, because such an action is an equitable one. In *Williams v. Everitt*,§ there was an express dissent on the part of the holders of the money, and no privity of contract between the plaintiff and defendants, but the principle is admitted there, that money had and received might be transferred with consent of the holder. The same point is to be found so ruled in the case of *Israel v. Douglas*,¶ and in *Mouldsdaie v. Birchall*,¶ and that even where the amount of the debt transferred was uncertain. The case of *De Burnales v. Fuller*,†† also supports the same position.

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In the present case, the bank assented to the transfer of the credit which had been originally given to Davies; and the plaintiff, by all his *subsequent dealings with them, manifested his entire confidence in the bank, and tacitly agreed to the transfer of the debt due from the old firm to him to the credit of the new firm.

This is an equitable action, and the courts of equity have always kept in view the object of meeting the justice of every such case as this, in their determinations on similar questions. In *Ex parte Peele*,‡‡ the present LORD CHANCELLOR said, speaking

† 5 Taunt. 450.

‡ 6 R. R. 853 (4 Esp. 203).

§ 13 R. R. 315 (14 East, 582).

¶ 1 H. Bl. 239; Sed vid. *Taylor v.*

Higgins, 3 East, 169.

¶ 2 H. Bl. 820.

†† 13 R. R. 321 n. (14 East, 590 n.).

‡‡ 6 Ves. 602.

of the case of *Shirreff v. Wilks*,† which had been cited in argument,—“Very slight evidence possibly might have been sufficient to shew, that the partner knew the stock had been sold, and the benefit taken into the stock in which he was partner, and therefore it was conscientious that he should become liable for that.”

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They then took several points of distinction between the present case and that of *Daniel v. Cross*;‡ as that in that case the plaintiffs were creditors of the old partnership, by notes for money paid into the bank: whereas, here, nothing had been given but mere receipts—there, the partnership had been only recently dissolved,—here, it was four years and a half, and no application had been made—there, also, there had been no independent dealings between the creditor and the new firm, as a new firm, but all that passed between them was referrible to an agency on the part of the new firm for the former partner. They also distinguished the present case *from that of *Devaynes v. Noble* § as not being one on a question of following the assets of a deceased partner; and as that was a case where the interval of the change of firm and of dealing with the two firms was only eight or nine months, they submitted, therefore, that this case was rightly left to the jury, and that the Court would not now disturb the verdict.

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Jervis, in support of the rule, contended, that the direction of the learned Judge was incorrect, and that the jury had drawn a wrong conclusion. He submitted, that if Gough had been desirous of proving this debt under the commission against the new firm, he would not have been permitted to do so on the ground of his legal right, as against the present defendant—that nothing had been done by the plaintiff to release Davies, who was clearly originally liable—that the plaintiff had never trusted the new firm exclusively, or shewn himself to have done so by any one act. He relied altogether on the facts of the case, and the authority of *Daniel v. Cross*, and the cases there cited.

† 5 R. R. 509 (1 East, 48).

§ 15 R. R. 151 (1 Mer. 530).

‡ 3 R. R. 94 (3 Ves. 257).

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Puller, on the same side, was stopped by

GRAHAM, Baron :

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The question left to the jury was, whether, under the circumstances, they would presume that the plaintiff had adopted the new firm as his debtors, to the release and discharge of the old ? According to the view which I have of *this case, it does not appear to me, with deference to the learned Judge, that the case furnished sufficient evidence to induce the jury to come to this conclusion.

I lay aside the conversation between the defendant and the plaintiff's attorney; not that I say it was not evidence, but I do not consider it of any weight; and out of respect to the learned Judge, I will suppose there is some doubt about it, though I cannot impute to the gentleman who had that conversation, an intention to entrap the defendant.

The evidence is, that there was a firm composed of three persons carrying on business as bankers, one of whom still remains a partner in the new firm. This gentleman, the plaintiff, deposited money with that firm, from 1809 till 1811, when it was dissolved. A new partnership was then formed, with whom the plaintiff continued, trusting to the credit of the firm, to deposit money until their bankruptcy, taking accountable receipts; and on that part of the case the books, if produced, would have furnished decisive evidence.

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The amount deposited with the old firm was 2,213*l.* 10*s.* 8*d.* In October, 1811, the new firm was constituted; and it is important to consider of whom it consisted. One of the old partners goes out, and two of the old partners, Mr. T. Gibbons, senior, and Mr. T. Gibbons, junior, continue. Two new partners are admitted, and Mr. Davies is excluded. We have no evidence of what was done by the partners **inter se*. T. Gibbons the elder died in 1813; and the firm goes on without any alteration. No agreement is shewn relating to what took place—no settlement of accounts—nothing is drawn from the plaintiff's mouth, to shew that he released the old firm—nothing has been adduced to make him appear to have trusted the new firm, but the mere

fact, that he goes on paying money to the new firm, and receiving interest.

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There is therefore no evidence to shew that Mr. Gough adopted the new firm: what more has he done, than to say I am perfectly willing to take your security for the new debt, but I don't release the old firm. I keep their accountable receipts. Then it is said, that in the new books these gentlemen did, with the knowledge of the defendant, debit themselves with the old debt; but it is not proved that the plaintiff knew it. Their books would have given important evidence; and the reserve of the books shews they would not have furnished decisive evidence in the defendants' favour. Nothing is shewn but the account marked C. stating the specific sums paid in. They go on in the same way from the first to the last. It appears to me that this account made an impression upon an extremely intelligent mind, that these sums were carried to the debit of the new firm, but I think otherwise. Supposing the plaintiff to have known the contents of the books, there was nothing to lead him into an impression, that by receiving interest of the new firm, he was discharging the old. He says (it is true), "I call upon you for payment of interest upon the *whole debt, but one of the old firm remains a partner in the new, so that one of you, at least, is responsible to me for interest on the whole." Then he does not give up the accountable receipts; therefore it strikes me, that the mere circumstance of his receiving interest of the surviving partner cannot release the old firm. Suppose he had brought his action against the new firm, how could he have maintained it? The mere production of the paper, and the draft for payment of interest, would, I think, have been insufficient. If the new partnership had given notice to him to produce the old receipts, he would have been nonsuited, and this general tally of sums received would have been no answer. It seems to me to be going too far to say, that there is any evidence to shew that the old firm was released. The conversation with the solicitor is not immaterial; and the defendant did actually receive an indemnity for this demand. The case, I think, was too weak to be left to a jury; it should have been said, that there was not sufficient evidence to exonerate the

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DAVIES and
GIBBONS, defendant from his responsibility for the money actually advanced to the bank before he ceased to be a partner.

Wood, Baron :

[*214] I am of the same opinion. It does not appear to me that there was evidence to discharge Davies, as one of the partners of the old firm. The plaintiff deposits money with the bank, or in other words, lends it to them at interest. The old partnership is dissolved, and new partners are taken in : he trusts the new partners as he did the old ; but that is not in itself any discharge. What *then is there proved beyond that, to discharge Davies ?

There is not any evidence that the plaintiff agreed to release the old and receive the new firm as his debtors. The only evidence is, that the new firm paid interest upon both debts ; one of the new having been a partner in the old firm. What does this prove ? The plaintiff might not have known that a new partnership was formed ; but even if he knew that the new firm took upon themselves the debts of the old, it would not have affected him, as discharging them ; nor would any thing passing merely *inter se* have done so. There is nothing, that I can see, except the mere payment of interest, which looks any thing like a discharge, and I cannot think that that can discharge the old firm, more especially as one of the partners was the same. At first, I thought there had been a balance struck, and carried to the debit of the new partnership account ; and that the plaintiff had known of that, and had assented to it : if he had done that, it would have been a very different thing ; but that is not the case, no balance had been struck. It does not appear that they have in their own books done so.

[*215] If it had appeared that the plaintiff had received from the new firm as much money as would have paid the whole of the old account, it might have discharged the defendant ; but no agreement between themselves and the new partners would discharge the old partners from Gough's demand. It appears to me, therefore, that the direction was *wrong, and that the case of *Daniel v. Cross* is in point.

GARROW, Baron :

I cannot agree that there was no evidence to be left to a jury ; I think there was important evidence to be left to a jury, and that the judge was so far right. In deference to the rest of the Court, however, I abstain from saying more. I would only observe, that the withholding the books cannot be imputed more to one of the parties than to the other of them ; because the plaintiff, by giving a *subpœna duces tecum* to the banker's clerk, might have compelled their production.

It is not necessary for me to go into the case at any length : the majority of the Court being against me, there must be a new trial. I shall not attempt to shew, and do not mean to intimate, that they are wrong, but merely to say that I certainly entertain much doubt.

Rule absolute.

ARMSTRONG v. HEWITT AND OTHERS.

(4 Price, 216—224.)

1817.
June 18.

In an action by a vicar for an account of tithe of hay, the only documentary evidence tendered, of title to tithe hay in the parish generally, was the Ecclesiastical Survey of 26 Hen. VIII. : Held, that in the absence of evidence of perception in particular lands, the statement in this Survey that the vicar was entitled to tithes of hay within the parish was not evidence of title to tithe from those lands.

*Exchequer
Chamber.*

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The three legitimate repositories of terriers and vicar's books, to make them evidence, are, the church-chest—the registry of the bishop—and the registry of the archdeacon.†

THE principal point in this tithe cause, which was instituted for an account of tithe of hay, was, how far perception to a certain extent, in certain parts of a parish, was evidence of a vicar's general title to the tithe in question, in other parts wherein he could not prove perception.

* * * * *

The plaintiff put in, as the only documentary evidence of his general right to tithe of hay in the parish, the ecclesiastical survey of the 26th Hen. VIII. which stated the vicar to be entitled to tithes of hay within the parish,—vicars books, containing

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† As to the church-chest the case 54 L. T. 529, 531 ; 34 W. B. 514, is referred to as an authority by 515.—R. C.

KAY, J. in *Bidder v. Bridges* (1886)

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[*218] entries of money received for tithe of hay,—and various terriers, noticing that tithe-hay *was payable in kind to the vicar, except as to certain persons not connected with the present suit.

Those vicars books were produced from the church-chest. It was objected by *Martin*, that they were, therefore, not admissible in evidence against the occupiers in support of the vicar's claim ; for that as they had not been found in either of the only proper repositories †—the bishop's register office, or the archdeacon's registry—but were brought from a custody peculiarly under the control of the vicar, he was not entitled to use them in his favour ; and he cited *Atkyns v. Hatton* ‡ and *Miller v. Foster*, in the note to that case.

On the other hand it was insisted, that the parish church-chest was an authenticated and legal repository, and one which invested the document with as full authenticity as either of those which had been named ; and that such a custody rendered terriers admissible in evidence, on which ever side of a tithe-question they might be offered ; because it is a repository connected with their contents, accounting for the custody. *Potts v. Durant*.§ *Bullen v. Michel*.||

RICHARDS, Chief Baron :

[*219] If this book had been produced from the same custody by a plaintiff, in a *suit to establish a modus, it would clearly be evidence for him : why then is it not admissible against him ? The books contain historical facts connected with the parish ; and what place is so proper for the custody of such a piece of evidence as the chest of the parish church. The propriety of its custody is founded on the same principles as those which regulate such questions with respect to terriers.

The books were therefore admitted.

The depositions for the plaintiff tended to shew that the vicar

† It was stated by Mr. Caley, that there were three legitimate repositories ; namely, the bishop's registry, the registry of the archdeacon of the diocese, and the church-chest ; and to that statement the Lord Chief

Baron assented.

‡ 3 R. R. 589 (2 Anstr. 386).

§ 4 Gw. 1406 ; H. 1450—4.

|| 16 R. R. 77 (4 Dow. 297, 2 Price, 399).

had received the tithes of hay in the parish generally, and in the district of Cargo. ARMSTRONG
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On the other hand it was proved, that neither the vicars, nor any of their lessees, had ever received any such tithes for the lands occupied by either of the defendants. The persons who had farmed the tithes of hay of the parish under several former vicars also proved that they had never taken or demanded tithes of hay of the lands in question, because they did not consider themselves entitled to them; for that the last vicar had informed his lessees that the vicar was not entitled to the tithes of hay for the lands of Cringle Dyke and Burnt Hill; and one witness stated that compositions had been paid for these lands to the impropiators for tithes both of corn and hay.

Martin and *Barber* contended, that a sufficient *prima facie* case had been proved by the plaintiff to cast on the defendants the *onus* of establishing *a defence by proving either a title to the tithes of hay, or an exemption, particularly as there was no one mentioned to whom the tithe of hay has been paid.

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Dauncey and *Phillimore*, for the defendants, insisted that a vicar was bound to make out a clear title before he could call on the defendant to answer his case; that in the present instance the vicar had given no proof of perception of the tithes of hay from Cringle Dyke or Burnt Hill farms, for that no part of the evidence went to affect those lands; his case, therefore, resting on perception, failed as to all such parts as were not shown to have ever paid any tithes. There is also evidence of disclaimer; for it appears that the vicars have, on many occasions, let their tithes with an express declaration that they had no right to tithe-hay. And they submitted, therefore, that the plaintiff had not made out such a satisfactory case as to call on the occupiers for any defence.

RICHARDS, Chief Baron, [having stated the object of the bill:]

In this case the vicar is undoubtedly bound to shew his title, for the common law gives him no right, and the plaintiffs, who are his lessees, stand in exactly the same situation as the vicar himself.

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The plaintiff is in this predicament: having no existing endowment to produce, we must collect entirely from the evidence of usage, whether there ever was an endowment giving him the tithe of hay. *The first evidence is the Ecclesiastical Survey, 26 Hen. VIII., from which it appears, that the vicar had *decimas fœni*; and wherever that survey is considered as evidence, it is no doubt in the nature of an endowment. But the ecclesiastical survey, or any other ancient document, is not, in point of evidence, equivalent to an endowment or to usage. Then there are produced five vicars books, from which, at one time, I thought that there was a general title shewn to be in the vicar, to entitle him to the tithe of hay throughout the parish, and that they would be sufficient to authorize me in deciding this case in favour of the plaintiff; but we must look at the evidence on the other side, and it happens, that in a court of equity every witness whose depositions appear on paper, is unfortunately equally entitled to credit, and so far I have not the means which a jury have of weighing the testimony of one witness against that of another. Now, the nature of the present question is not whether there exists any title in these defendants, but whether the plaintiffs are entitled. It is enough for the defendants to rest their case on the denial of the plaintiff's title. From the evidence, I say, the vicar has shewn himself to be entitled generally to tithe-hay throughout the parish, yet from the same evidence I must say, that the plaintiff has not made out a title to hay in every part of the parish. The vicar's books are strong evidence, and they support the ecclesiastical survey; but they do not show that the tithes are due to the vicar for these farms, for they only show him to be entitled generally, and not to every acre of the parish.

[The learned Baron then went into the oral evidence (which was conflicting) upon the contention by which the plaintiff offered to rebut the presumption afforded by the non-perception in the lands in question; namely, that there had been no hay worth collecting, and directed an issue.]

Issue decreed.

DICKENSON v. HARRISON.

(DEMURRER.)

(4 Price, 282—283.)

1817.
June 23.

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A principal sum secured by deed, and the interest stipulated to be payable thereon, are two distinct sums, and not one entire sum, and either may be sued for independently of the other.

Interest is not a part of the debt secured by mortgage, but rather sounds in damages, although, *semble*, it may be sued for in debt.

THE plaintiff declared in debt against the defendant, on a mortgage for securing the sum of 800*l.* to be paid on a future day, with interest.

To that declaration the defendant demurred; for that an action of debt is not by law maintainable for part of an entire duty created by one and the same covenant or contract; nor can part of such duty be declared for in such action as debt, and part damages, where the covenant is express to pay the principal sum with interest; and also, for that an action of debt is not by law maintainable for interest accruing from day to day; and that the said declaration does not shew any right in the said plaintiff to recover the said sum of 800*l.* thereby demanded.

Lawes, E. for the demurrer, contended that the declaration was bad, for want of an averment that the interest up to the day of default had been paid; for that a declaration in debt for part of a duty, without shewing that the residue had been satisfied, could not be supported; and he cited *Mounson v. Redshaw*.† This demand, he submitted, was for *a sum of money due upon mortgage, and therefore the interest up to the day was recoverable in debt, as part of the contract, and therefore ought to have been included, or stated to have been satisfied. On that ground he distinguished this case from that of *Seaman v. Dee*; ‡ for the debt, in that case, became due on the making of the deed, and there the interest, held not to be recoverable in debt, must have been as to such as should have become due after the day; and in *Herries v. Jamieson*,§ where the authority of that case was generally doubted by Lord KENYON, and there-

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† 1 Saund. 201.

‡ 1 Vent. 198.

§ 5 T. R. 553.

DICKENSON fore much shaken, it was held, that debt would lie for the
 v. interest of money. In *Lapiere v. Gen. St. Albans*,† it was held,
 HARRISON. that on a single bill for a sum certain, the interest ought to be
 taxed; but where the interest is not in damages, but is stated
 and fixed at a certain rate, debt will lie. *Williams v. Fowler*.‡

[*284] The main ground of this demurrer (he submitted) was, that in
 the present case the interest up to the day of bringing the action
 was recoverable as part of the debt, which is entire, and cannot
 be kept separate; and the declaration, therefore, was radically
 bad, unless the interest were shewn to have been paid. So
 Com. Digest, tit. Pleader, 84 (C. 84) and *Holt v. Sambach*.§ To
 the same point he cited *Welbie v. Phillips*,|| where it was held on
 demurrer that a declaration for less than *the plaintiff was
 entitled to, under one entire and several demand, was bad. So
 also in *Hunt v. Braines*;¶ *Pemberton v. Shelton*;†† and *Bailey v.*
Offord.‡‡

Littledale, in support of the declaration, insisted that the
 plaintiff was entitled to abandon any claim of interest which he
 might have, and proceed for the principal alone. Then the
 question on the record would be, whether the plaintiff were
 entitled to recover the principal. He submitted, that this was
 precisely the case put by Lord HALE, in *Seaman v. Dee*, of a
 party covenanting by deed to pay principal and interest, where
 it was held that the interest was not to be included with the
 principal in an action for debt. The reason being, that it shall
 be turned into damages, which the jury is to measure. What-
 ever doubt was thrown on that case by the *dictum* of Lord
 KENYON, in *Herries v. Jamieson*, it was not overruled; nor was
 it necessary on that decision that it should be; for the sole
 result of that case is, that if a plaintiff choose to proceed for
 interest separately, he may do so.—In the case cited from Cro.
 Car. and in all the others, the plaintiff declared for less than was
 manifestly due to him on his own shewing, and in those of

† 2 Ld. Raym. 773.

‡ 1 Str. 410.

§ Cro. Car. 104.

|| 2 Ventr. 129.

¶ 4 Mod. 402.

†† Cro. Jac. 498.

‡‡ Cro. Car. 137.

course the declaration would be bad, unless it was shewn that the rest had been satisfied. There are cases which hold that a plaintiff must wait till the last day, but here the last day was past. A party may either sue for *a principal sum of money, or for the interest due on a given day ; but if he sue for the latter, he must declare for the whole, or shew the rest satisfied. In the case of *Welbie v. Phillips*, the plaintiff sued for a whole year's rent, and declared for only half a year. The distinction is, that in this case the contract for re-payment of the principal sum is independent of the contract for the payment of interest. In cases of rent, if one proceed for a subsequent quarter, it shall be intended that the previous quarters have been satisfied ; but the demand of interest is quite different, because it is accruing from day to day.

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Lawes, in reply :

There can be no intendment on a special demurrer. Though interest be a claim accruing from day to day, it may still be sued for integrally up to any given time, for *id certum est quod certum reddi potest*. The authority of Lord HALE, in *Seaman v. Dee*, it has not been necessary to impugn, because that case is distinguishable. The jury cannot assess interest up to the day in a case of this sort, by way of damages *detentione debiti*. The argument, that the plaintiff may abandon his claim of interest, is answered by the fact of his not having so declared, and that it is which forms the objection to the declaration raised by this demurrer ; for if that claim had been explicitly abandoned, there would have been no ground for this discussion.

GRAHAM, Baron :

It would have been more satisfactory to me to have taken time on so nice and important a question as the present ; but as my *brothers entertain no doubt, I shall give my opinion at once. [His Lordship then stated the objection raised by the demurrer.] Now certainly common sense suggests, that there would be much hardship in allowing that objection to prevail, by holding that a party cannot waive his claim for interest, and sue his debtor for the principal sum due only ; and I feel myself

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DICKENSON grounded in deciding that he may, by the authority of my Lord
 v. HARRISON. HALE in the case of *Seaman v. Dee* ; and I do not consider that his opinion has been overturned by the subsequent case of *Herries v. Jamieson*. I think the distinction taken by Lord HALE is sound and just. Indeed the case of *Herries v. Jamieson* differs from it only in holding, that, notwithstanding interest in general is properly for the consideration of a jury, because sounding in damages, yet that a party may bring debt for it wherever the amount has been liquidated.

When the sum sued for is less than what appears to be due, no doubt it should be shewn that the rest has been paid ; but in a case where the claim of interest is created by deed, the principal debt is one thing, and the interest accruing, another. The latter is in the nature of damages only, and therefore the plaintiff may, if he pleases, waive that claim.

Wood, Baron :

Notwithstanding a great many cases have been cited in support of this demurrer, I think them all distinguishable from the present, and that the objection which has been raised by it is not on any ground sustainable.

[287] In the deed, as set out in the declaration, there is the usual covenant that the defendant would pay the plaintiff the sum of 800*l.*, and also something more at the same time, which was the interest, and that is equivalent to a covenant to pay two distinct and independent sums of money. The breach is, that nevertheless the said defendant did not, nor would, pay the said sum of 800*l.* on the day and time mentioned and appointed for payment of the same. In all probability the interest has been paid down to the time : afterwards there must have accrued some further interest, but that can be recoverable only in the way of damages.

The question on this demurrer amounts in truth to this—whether, when two distinct sums are due to the same person, on the same day, under the same instrument, he may not sue for either, at his election ; or whether he is therefore necessarily compelled to proceed for both in the same action ?

I am of opinion that he might sue for either ; and in the

present case, I think the sums are completely distinct and unconnected, notwithstanding they become due by the same instrument, and that they may therefore be separated by a plaintiff who sues to recover them, so as to be made the subject of separate actions.

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The decisions that have been cited were all on cases where the debt was one entire demand; and I agree that where that is so, you must aver in your declaration, if you proceed for a part of the debt, that the rest has been satisfied; as if in this declaration *in debt for 800*l.* after having set out the covenant, the plaintiff should have gone on to state whereby an action hath accrued to him, to demand and have of and from the said defendant 700*l.*; that would have been an obvious and palpable inconsistency on the face of the declaration, which would undoubtedly have been, therefore, bad; but that is not so here, or anything like it; he demands strictly the integral sum of 800*l.*; and that is a good demand; for the other sum is distinct and separable, and need not be demanded by the declaration, or shewn to have been satisfied.

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I am therefore of opinion, that this declaration is properly drawn. It certainly might have been made more formal, but that was by no means necessary; therefore there must be judgment for the plaintiff.

GARROW, Baron, concurred:

I will say one word only, varying my opinion from that of my brother Wood, who has said that these two sums are separable—I say that they are in their nature separate, and never were one integral sum, and the reason, good sense, and justice of the case, are all against the objection.

Per Cur. :

Judgment for the plaintiff.

WARDE *v.* JEFFERY.

(4 Price, 294—299.)

1817.
June 25.

[294]

A purchaser who has entered into possession without knowledge of the title, and afterwards, having discovered a defect in the title, remains in possession, and continues to negotiate with the vendor, cannot rescind the contract merely on account of delay in completing the title.

THIS bill was filed for a specific performance of a contract, dated the 2nd January, 1813, for the sale of an estate in certain glebe land and great tithes, and to compel the defendant to pay the remainder of the purchase money (3,500*l.*) ; and for restraining him from proceeding farther in an action commenced by him to recover back such part of the purchase-money as had been paid by the defendant to the plaintiff on account.

The defendant, in his answer, admitted the agreement, and that he had entered into possession and receipt of the said tithes and premises in the same month, and received the rents at the following Michaelmas, but insisted, that having been advised, on the abstract being delivered in the month of October, 1815, that the title was defective, he afterwards (on the 22nd January, 1815), gave notice of his relinquishing the contract ; of which relinquishment he also gave notice to several persons with whom he had made sub-contracts, for the sale of parts of the said glebe and tithes, previous to his *commencing the action for the recovery of the purchase-money which had been so advanced ;—and that he could not afterwards be considered as in possession.

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The answer also stated, that after the defendant had paid the two first instalments of 2,000*l.* and 500*l.* and interest, down to the first of January, 1816, he then first discovered that the right to tithes did not extend to all the lands mentioned in the agreement ; and therefore he applied to the plaintiff for a terrier or particular of the said tithes, which was not furnished ;—and that being pressed for further advances, he wrote a letter to the plaintiff, on the 7th January, 1817, stating that when he should have received the terrier, before mentioned, and have been allowed for the quantity of land which appeared to him to be deficient, he would pay the farther money required of him, into any banking-house in London, but that such terrier had never been sent to him.

The defendant admitted the action was brought in last Easter Term, and submitted, that as the plaintiff had not made out a good title in a reasonable time, whereby he had sustained great damage, loss and trouble, he was therefore not bound by his said contract, or to accept such title as the plaintiff could make to the said lands, tithes and premises, which he had been advised and believed was not good or marketable. On these facts,

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v.
JEFFERY.

Trower and *Lovat* now moved for an injunction, as to the defendant's action at law, which

Martin and *Spranger* opposed, contending, that contracts were not to be thus kept open to an indefinite period; and that there must be some time limited within which a vendor ought to be compellable to perfect his title, or a purchaser should be at liberty to abandon it. And they urged the fact of possession having been given before the delivery of the abstract, to shew, that at the time of the defendant's taking possession, he was not aware of the objection to the title.

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Trower and *Lovat*, *contra*, contended, that time was not of the essence of such a contract, and therefore the plaintiff was not bound to complete his title within the precise period. They insisted that it was the defendant himself who had delayed the performance of the contract, for the plaintiff had been always desirous of so doing, while the defendant was throwing objections in his way; and the purchase-money being a large sum, it must be a great object to a vendor who has parted with the possession of his estate, to receive it in this or any case. They submitted, therefore, that the Court would not decide so important a question on an interlocutory motion.

RICHARDS, Chief Baron :

The Court are of opinion, that the injunction ought to go. I will state the reasons which govern me, and which may, in the end, be useful to both parties. This case does not involve the question (which must, whenever it arises in any case, be the consequence of very special circumstances) of time being of the

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v.
JEFFERY.
[*297]

*essence of a contract. In almost all the cases where the time is fixed, as if it were that the estate should be conveyed within three months, the time is not even then of the essence of the contract, for most generally it cannot be done. Lord THURLOW was strongly of opinion in favour of the rule, that time should not be of the essence of a contract, even where the agreement was for a particular day; and on one occasion,† where it was put hypothetically in argument, that there might be an express clause inserted for making such a contract void, Lord THURLOW's short answer was,—“Well, Mr. Mansfield, what would you get by that?” But the argument raised on the fact of four years having expired in this case, without a title being made, much surprised me when used by a purchaser, who has himself lain by for a considerable time, without taking any steps, or shewing any anxiety to get his contract completed. He has been equally guilty of delay, although he complains of the plaintiff. [His Lordship dwelt with particularity on the dates of the different periods of the negotiation, and adverted to the fact of the defendant having continued in possession.] Possibly the defendant might have declared off when the abstract was delivered, or in a reasonable time after; but then he must have delivered up possession; but here, from the year 1813 to 1815, letters have been continually passing between the parties, on the subject of the contract; and he accepts farther abstracts, and goes on with the negotiation down to the 7th January, *1817; on that day, admitting, therefore, that he considered himself to be still a purchaser, and yet so soon after that time,—and after that long course of negotiation, as the 22nd of the same month, he turns round on a sudden, and without previous notice, sends a letter, in which he says he declares off, and that on an objection to the title, which he was aware of from the year 1813. Now, can any case be imagined, where, under such circumstances, the Court would refuse to interfere? Surely this is, therefore, a very clear case, and I think that the purchaser is still bound by the contract. For these reasons, independent of the general rule,—that injunction ought to be granted on motion where a *prima facie* case, for the interference

[*298]

† *Gregson v. Riddle*, cited in *Seton v. Slade*, 6 R. R. 127 (7 Ves. 268).

of the Court, is made out,—I should, in such a case as this, say the defendant was bound, were I now giving judgment on the hearing. The better course however would be, that the parties should agree to a reference in the mean time.

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v.
JEFFERY.

GRAHAM, Baron :

I am clearly of opinion that the defendant ought not to be permitted to go on with this action. There is no time specified in the contract for its completion. The defendant was put into complete ownership of the property, and has been long in actual possession of the profits ; and he enters himself into contracts to sell. The question then is, whether the Court will, in a case of this sort, say that a vendor is bound to complete his title within a certain reasonable time, when the parties themselves have made no such agreement? *But here, the defendant, by his letter, admitting himself bound so late as the 7th January, 1817, requiring further satisfaction as to the title, cannot be allowed, on the 22nd, to declare off, on the ground of the vendor's having neglected to perfect his title in a reasonable time. And the hardship of suffering this action to proceed, would be the greater, because the defendant has received considerable sums of money from the rents and profits. Whenever this shall come to a hearing, there must be a decree for the plaintiff. As to the question of the title, that must go before the Master.

[*299]

WOOD and GARROW, Barons, of the same opinion.

*Injunction granted, and title to be referred to the
Deputy Remembrancer.*

1817.
June 25.

JONES AND OTHERS v. DARCH AND OTHERS.†

(4 Price, 300—302.)

[300]

In an action on a bill of exchange against the acceptors, where the payee and first indorser was an infant, the jury having found a verdict for the plaintiffs, on evidence that the defendants knew, when they accepted it, that the payee was an infant, and that he had, in fact, indorsed the bill before they accepted it; the Court, under those circumstances—(it appearing also that the defendants had been in the practice of raising money on similar bills), refused to disturb the verdict by granting a new trial, applied for on the ground of the legal objection—that an infant could not, by his indorsement, give currency to a bill of exchange; but they refrained from giving any opinion on the effect of it, if brought before them on a case more free from imputation.

THIS was an action on a bill of exchange drawn by Thomas Aspull on the defendants, (Darch, Dickenson, & Co.) and accepted by them, in favour of Messrs. Wm. Aspull & Co., and by Wm. Aspull indorsed to one Booth, and by him to the plaintiffs, who were his bankers.

It appeared in evidence, on the trial before the Lord Chief Baron, at the sittings in this Term, that Thomas Aspull, the drawer of the bill, had been managing clerk of the defendants at the time when the bill was drawn; that the defendants afterwards stopped payment: on which occasion it was arranged between them and their creditors, that on the latter receiving 10s. in the pound by three instalments, no commission of bankruptcy should be sued out against them; and certain persons, who had become security for the due payment of those instalments, entered also into a bond of indemnity to the defendants (on having their property delivered up to them) against the future claims of any of their creditors.

[*301]

The defence set up was, that Wm. Aspull the *payee, who was the son of Thomas Aspull the drawer, was an infant, and could not therefore indorse a bill. And it was put as a suspicious

† Although this case is hardly a decision on the only important point raised, it seems best to retain it, having regard to the paucity of authority on the point before the Bills of Exchange Act, 1882. The case seems, so far as it goes, to sup-

port Judge Chalmers' statement, 4th ed. p. 60, that the second sub-section of the 22nd section of the Bills of Exchange Act, 1882, is probably declaratory, although the law was not very clear.—R. C.

transaction altogether; because, it was stated, that the bill had been in fact applied to the private purposes of the drawer, who was said to have deceived his employers, and that he had kept it back till after the settlement of the defendant's affairs, and that there was no other person in the firm of Wm. Aspull & Co. besides Wm. Aspull, nor ever had been. It was also objected, that in point of law the payee, who was of course the first indorser of the bill, being an infant both then and now, was not entitled to indorse, nor could, by his indorsement, give currency to the bill, or render it legally negotiable. But the cause being suffered to proceed, it appeared that all these circumstances were known to the acceptors (the defendants), and that the bill had been indorsed before they accepted it, and therefore the jury found a verdict for the plaintiffs.

JONES
v.
DARCH.

Jones now moved for a new trial, on the ground of the objection, that the indorser, being an infant, could not give the indorsee a right to sue on it against the defendants; and he cited the case of *Williams v. Harrison*,† where it was ruled, that infancy was a good bar to an action on a bill of exchange, notwithstanding the custom of merchants. In the present case, the infant was the first indorser, and as he could not bind himself, the bill could not be negotiated through him; and *he distinguished this case from that of *Taylor v. Croker*‡ by its having been proved here, that the indorser was not even now of age, so that there could be no subsequent consent implied, or any new promise made.

[*302]

But the Court refused the rule, saying, that as far as these defendants were concerned, who were proved to have known all the circumstances before they accepted the bill; and as it appeared from the evidence (which the jury believed) to have been their object to get all the money they could by means of such bills; they ought not now to be permitted to avail themselves of the objection, whatever weight it might have had in a case of different circumstances.

Rule refused.

† Carth. 160.

‡ 4 Esp. 187.

1816.
Dec. 16, 20.

1817.
July 11.

[346]

SCOTT v. BECHER AND WIFE, SHARP (THEIR AGENT), AND THE GOVERNOR & CO. OF THE BANK OF ENGLAND.

(4 Price, 346—352.)

The Court will appoint a receiver of an intestate's personal estate when the administrator is sworn to be insolvent before his answer be come in, although the fact of his being abroad stated in the plaintiff's affidavit be denied.†

[*347]

THIS bill had been filed by one of the next of kin, (who was also a creditor of the intestate) against the defendants, who were the administratrix and her husband, and their agent, and the Bank, for an account of an intestate's personal estate, and that a receiver might be appointed, and for an injunction *to restrain the defendants from transferring funds standing in the name of the intestate.

The suit was founded on the ground of the administratrix and her husband, (who had become insolvent) having gone abroad, and a previous misapplication of the assets.

1816.
Dec. 16.

The defendants had appeared, but had not answered, and the plaintiff now (before answer), moved as above, on the authority of the cases of *Taylor v. Allen*,‡ and *Middleton v. Dodswell*,§ and on an affidavit, stating that the husband of the administratrix was insolvent, and had with his wife gone abroad, and that the other defendant Sharp, their agent, was an uncertificated bankrupt.

* * * * *

Dec. 20.

[348]

Pepys now moved on the bill, supported by the affidavit, for a receiver of the outstanding personal estate, and an injunction to restrain the defendants, Becher and Sharp, from selling out the stock belonging to the estate of the intestate, and particularly as to two sums of 900*l.* and 500*l.* standing in the funds in his own name; the affidavit stating that the sum of 900*l.* had

† As to the modern practice and cases, see the Judicature Act, 1873, s. 25; *In the goods of Moore* (1888) 13 P. D. 36, 57 L. J. P. 37; *Holmes*

v. Millage, '93, 1 Q. B. 551, 4 R. 332, 62 L. J. Q. B. 380.—R. C.

‡ 2 Atk. 213.

§ 13 Ves. 266.

been transferred from the name of the deceased, into the name of the defendant Becher; and that the other sum of 500*l.* which had been purchased by Becher afterwards, was purchased, as the plaintiff believed, from his acquaintance with the defendant's circumstances, with the produce of other stock, also part of the intestate's estate, which had been sold by the defendant Becher; and from collecting an outstanding estate.

SCOTT
v.
BECHER.

The defendants' affidavit denied that the defendant Becher was abroad, but did not effectually answer the fact of his insolvency.

The Court granted the receiver, and the injunction as to the outstanding estate, and also as to the sum of 900*l.* but they refused it, with respect to the 500*l.* on the ground that the plaintiff could not know with what monies it had been purchased.

* * * * *

ROBINSON AND OTHERS v. MULLETT AND OTHERS.†

(4 Price, 353—354.)

1817.
July 12.

[353]

A solicitor who has acted to a certain extent only for parties defendants in an amicable suit in Chancery, will not be restrained from acting in a cause by bill filed by some of those defendants against others of them, the solicitor making affidavit that he is not confidentially possessed of any secrets which might be used to the prejudice of such other defendants, or has knowledge of any facts unknown to his clients.

It appears to be necessary that a solicitor, in such a case, should be shewn to be possessed of knowledge of matters which might give him undue advantage, to found such a motion.

A BILL had been filed in the Court of Chancery, by one of the defendants in this cause (a residuary legatee) against the plaintiffs and the other defendants, (other residuary legatees and

† As to solicitor's duty in accepting retainers from parties having conflicting interests, see *Cholmondeley v. Clinton* (1815) 13 R. R. 183 (19 Ves. 261); *Taylor v. Blacklow* (1836) 3 Bing. N. C. 235; *Davis v. Clough* (1837) 8 Sim. 242; *Barber v. Stone* (1881)

50 L. J. C. P. 297. As a case where the Court of Chancery refused, as the Court of Exchequer did in the above case, to grant an injunction, see *Bricheno v. Thorp* (1821) Jacob, 300.—R. C.

ROBINSON
v.
MULLETT. executors,) for the purpose of procuring the opinion of the Court upon the construction of the will. All the defendants in the suit in Chancery, which was an amicable one, employed the same solicitors to put in their answers. In consequence of disputes afterwards arising between the parties, the plaintiffs in this suit filed their bill against the executors, and other parties, to have the trusts of the will executed, and for an injunction and receiver; and employed the solicitor who had been employed by themselves, the executors, and the other parties, in the suit in Chancery, to prosecute that suit.

Fonblanque, on the part of the executors, on the authority of *Cholmondely v. Clinton*,† and an affidavit that the plaintiffs now solicitors had been retained by and were still acting as solicitors, as well for the plaintiffs as for the executors and others, and the now defendants in the suit in Chancery, obtained an order of Court, that they should be restrained by injunction from acting as solicitors for the plaintiffs in this suit, or as attornies or solicitors in any other suit at law or in equity between the parties.

[354] That order had been obtained in the absence of the solicitors who were the object of it; and now

Agar, and *T'eed* moved that it might be set aside on that ground, and on the deposition of the solicitors, that they were not in possession of any secrets of the defendants, or any information whereby their interest could, in the slightest degree, be prejudiced; and that all communications made by the defendants to them, had been made in the presence of the plaintiffs, or subsequently related to them by the deponents.

The Court held, that the employment of these solicitors for the present plaintiffs by such of the defendants as they had acted for in that suit, and to such an extent only, was too slight a ground for the application to restrain them from acting in this cause, as there did not appear to have been any important confidential matter disclosed to them, the knowledge of which might be used in prejudice of the party so applying. Therefore, as to that part of the order, it was

Discharged.

† 13 R. B. 183 (19 Ves. 261, G. Coop. 80, 2 V. & B. 113).

HITCHCOCK *v.* GIDDINGS.†

(Daniell, 1—9.)

1817.

*June 4.**Gray's Inn
Hall.*

[1]

A vendor is bound to know that he actually has that which he professes to sell. And even though the subject matter of the contract be known to both parties to be liable to a contingency which may destroy it immediately, yet if the contingency has already happened, the agreement will be void.

The execution of a bond for securing the payment of the purchase-money is not a completion of the contract, and where fraud is made out the Court will relieve against it.

Where a bond is void, a repayment of interest which has been paid on the supposition of its being valid, will be decreed.

THOMAS MILLARD being possessed of certain freehold and leasehold estates, devised all his real and personal property to Mary Gill and Ann Wrentmore for their lives, and after the death of the survivor of them to Sandy Wrentmore Gill, and Ann Wrentmore Colmer, and the heirs of their respective bodies, as tenants in common in tail; and directed that, in case either of them should die without issue, then the part of the one so dying should go to the survivor of them, and the heirs of his or her body; and in case of failure of issue of both, he limited the property to two persons of the name of Vowle, in fee.

After the testator's death, Giddings, the defendant, purchased of the Vowles their reversionary interest under Millard's will; and, in the month of April, 1810, was applied to by the plaintiff Hitchcock to sell it to him. The defendant at first refused, but was afterwards prevailed upon by the plaintiff to sell him his interest in one moiety of the estates in question for the sum of 5,000*l.*; and an agreement to that effect was accordingly drawn up and signed by the parties.

[2]

On the 3rd of May following, an indenture of bargain and sale was executed, by which the interest of the defendant in one moiety of the property of the testator, Thomas Millard, subject to the life-estates of Mary Gill and Ann Wrentmore, and to the

† This case is also reported in 4 *Willis* (1865) L. R. 1 Ch. 58; *Emmer-Price*, 135; and see *O'chraane v. son's case* (1866) L. R. 1 Ch. 433.

HITCHCOCK estates tail of Sandy Wrentmore Gill and Ann Wrentmore
GIDDINGS. Colmer, was duly conveyed to the plaintiff. The plaintiff, how-
ever, did not pay the purchase money at the time, but gave the
defendant his bond for securing the payment of it with interest.
He afterwards paid the sum of 250*l.* for interest, but never
discharged any of the principal.

It was subsequently discovered, that the tenants for life,
together with Ann Wrentmore Colmer, who was the surviving
tenant in tail, had, previously to the contract with the plaintiff,
suffered a recovery, and thereby destroyed the remainder by the
will limited to the Vowles, and that consequently nothing passed
by the bargain and sale from the plaintiff to the defendant.

In consequence of this discovery the plaintiff filed his bill,
praying that the bond, given by him to the defendant for 5,000*l.*,
might be declared to have been fraudulently obtained, and that
it might be delivered up to be cancelled, and for a repayment of
the money already paid for interest, and an injunction in the
mean time.

[3] The bill charged that the defendant, at the time the contract
was entered into, knew the recovery had been suffered, but kept
back that fact from the plaintiff. This was positively denied by
the answer, and no evidence was given to fix such knowledge
upon the defendant.

It appeared by the evidence, that the plaintiff employed his
own solicitor to prepare the conveyance, who laid a draft of it,
together with an abstract of the defendant's title, before Mr.
Bridgman, a conveyancer at Bath, who, in the opinion, which he
gave upon the title, adverted to the power which the tenant for
life and tenant in tail had of barring the remainder proposed
to be purchased. On the 19th day of April, the defendant went
to the office of plaintiff's solicitor for the purpose of answering
certain queries which had been made on the margin of the
abstract by Mr. Bridgman; and on that occasion the plaintiff's
solicitor asked him, whether any recovery had been suffered?
and he then stated it to be his belief that none had; and in the
afternoon of the same day a similar enquiry was made in the
presence of the plaintiff, when the defendant returned the same
answer, upon which the plaintiff expressed himself to be perfectly

satisfied. The same assurance was given by the defendant at a subsequent meeting which took place between him and the plaintiff, when the plaintiff again expressed himself satisfied with the bargain, and said he could make 10,000*l.* by it, and offered to purchase the remaining moiety, which was declined on the part of the defendant. On the same day the plaintiff's solicitor insisted on his accompanying him to Mr. Bridgman's, to have some further conversation on the subject of the purchase; on which occasion Mr. Bridgman stated, that the only difficulty in the title was, that a recovery might have been suffered, and recommended a search to be made, when the plaintiff observed, that he was satisfied with the purchase, that it was worth 10,000*l.*, and that he *had lately been in London and had made a search, and that no recovery had been suffered. He then directed his solicitor to proceed with the engrossment of the deed, and on the Thursday following it was executed. Afterwards, when his solicitor informed him that a recovery had been suffered, and shewed him an extract of it, the plaintiff treated it with great indifference, and expressed considerable anxiety to purchase the remaining moiety.

HITCHCOCK
v.
GIDDINGS.

[*4]

Mr. Fonblanque, and Mr. Wingfield, for the plaintiff:

This is a contract which a court of equity will set aside. It was entered into under a mistake; the defendant supposing he had some interest in the estate agreed to sell it to the plaintiff, who purchased it under a similar notion: it afterwards turned out that the vendor had no interest whatever. This is clearly a case in which a court of equity will interfere to prevent the contract, while yet incomplete, from being enforced. There is a difference between contracts executed and executory: where the performance has been complete the Court will not undo it; but where it is incomplete, and it is founded on a clear mistake, the Court will interfere to prevent the party being called upon to complete it. The contract here is executory. The execution of the bond cannot be considered as performance. In most cases, where a party cannot perform his engagements at the time stipulated, a security is given. Here was an express, or at least an implied, engagement that no recovery had been suffered.

HITCHCOCK ^{r.} GIDDINGS. The fact of the plaintiff having made the search for the recovery himself, rebuts the supposition of its being a matter of indifference to him, as does likewise the fact of his having become the purchaser.

Mr. Martin, and Mr. Heys, for the defendants :

[*5] The case made by the bill is fraud, and nothing has been adduced *in evidence which goes to establish such a charge, and indeed all idea of fraud is totally rebutted. * * The only question then is, whether the bond be not payment? A bond has always been considered as the close of a transaction, and even a solicitor's bill will not be unravelled if a bond has been given for the amount of it. Suppose the plaintiff had given negotiable notes for the amount, would they not have been considered as payment? Why then should a party having a *higher species of security be in a worse situation than he would have been in if he had taken a lower.

[*6]

The payment of interest was a confirmation of the transaction. At all events there is no pretence to say, that what has been already paid must be returned : to this extent the transaction must be considered as complete.

Mr. Fonblanque, in reply :

Although the bill imputes the transaction to fraud, I am justified in taking the ground of mistake. * * *

The bond cannot be considered as payment ; it is merely an extension of the time appointed for the performance of the contract.

The payment of interest is no confirmation ; it was made under the idea that the bond was in force : the plaintiff is therefore entitled to a re-payment.

RICHARDS, Lord Chief Baron :

There certainly is in this bill a charge of fraud, which has been established, namely, that the defendant agreed to sell to the plaintiff an estate in which he had no interest. This is fraud in a court of equity ; though, perhaps, under the circumstances of this case, it is not so in a moral point of view.

It has been said that this is a contingency, and that if a party having a property of which a certain event may defeat him, and being ignorant that such event has taken place, sell his estate to another, who being aware of the contingency upon which it depends, agrees to take the estate on those terms, the Court will not relieve from so improvident a bargain; and certainly, where a party is determined to speculate and purchase an interest, which he is aware may be defeated on the happening of a contingency, which neither he nor the vendor is able to control, it is a foolish contract, but not such as a court of equity will interfere to set aside; but then it must be clear that the contingency by which the estate may be defeated, has not taken place.

HITCHCOCK
v.
GIDDINGS.

[7]

Here is an estate which, if no recovery had been suffered, was a good one. Both parties being equally ignorant *that a recovery had been suffered agree for the sale and purchase of the estate, and the purchaser is content to abide the risk of a recovery being subsequently suffered. He conceives, however, he is purchasing something; that he is purchasing a vested interest. He is not aware that such interest has already been defeated. The defendant thinks he has some interest; and the plaintiff thinks he is purchasing that interest: but this is not sufficient; the party selling must be satisfied that he actually has an estate to sell. Here he only *thought* he had it, when he had it not. He ought to have *known* that he had it.

[*8]

It has been argued that this bond must be considered as payment; and it has been said that even in the case of solicitor's bills, where a bond has been given for the balance, the courts will not unravel them; but that is because it must be supposed that, before so solemn an instrument is entered into, the parties have ascertained that the accounts are correct: but even in that case if the Court can be satisfied that the bond has been unfairly obtained, it will relieve against it.

In this case a fraud has been practised by defendant, I do not mean in a moral point of view, but such as a court of equity will relieve against. He has sold that *which he had not,—and shall the plaintiff be compelled to pay for that, which the defendant, had not to give?

[*9]

HITCHCOCK ^{v.} GIDDINGS. With respect to the interest, that follows the bond. If application had been made for an injunction before payment, the Court would have prevented it: it must be repaid.

With respect to costs, both parties have acted with an equal degree of folly; and one ought not to be in a better situation than the other. Both parties must pay their own costs.

[*9, n.]

Decree, Wednesday the 4th day of June, 1817:

It is ordered, adjudged, and decreed by the Court, that the defendant do deliver up to the plaintiff the bond in the pleadings of this cause mentioned, to be cancelled. And it is farther ordered by the Court that it be, and it is hereby referred to the deputy to his Majesty's remembrancer of this Court to take an account of what has been paid by the plaintiff to the said defendant for interest, or otherwise, on account of the said bond. In the taking of which account the said deputy remembrancer is to make to all parties all just allowances; and all parties are to produce, &c. And it is farther ordered by the Court that the said defendant do repay to the plaintiff what (if any thing) upon taking the said account, shall have been received by the said defendant for such interest, or otherwise, on account of the said bond, as aforesaid. And it is farther ordered, that the injunction heretofore granted in this cause, to restrain the said defendant from proceeding at law against the said plaintiff upon the said bond, be, and the same is hereby made perpetual; and it is farther ordered that each party do bear and pay his and their own costs of this suit.

HAMIL v. STOKES.

(Daniell, 20—27; S. C. 4 Price, 161.)

See p. 690, above.

FAIRBROTHER *v.* PRATTENT AND AITCHESON.

(Daniell, 64—70.)

1817.
Nov. 18.1818.
Jan. 17.

[64]

An auctioneer is the agent as well of the purchaser as of the vendor; and if the vendor commence an action against him for the recovery of the deposit, he may file a bill of interpleader, for the purpose of ascertaining to whom it belongs.

The Court will order the defendants to interplead, although one of them has not appeared to the bill, provided the usual process of contempt has been gone through.

THIS was a bill of interpleader, by an auctioneer, against the vendor and purchaser of an estate, who both claimed the deposit money: the plaintiff, after retaining the auction duty, paid the balance of the deposit money into court.

Aitcheson (the vendor) did not appear to the bill; and, after the regular antecedent proceedings, an order was pronounced that the bill should be taken *pro confesso* as against him.

Prattent (the purchaser) put in an answer, which was replied to; but neither party went into evidence. And the cause now came on for hearing.

Mr. Haslewood for the plaintiff. * * *

Mr. Rose, for the defendant Prattent. * * *

[65]

RICHARDS, Lord Chief Baron :

This is a bill by an auctioneer: he states in his bill that he was applied to by one party to sell the estate, so that he must have been originally the agent of the vendor. But the instant he put himself into the box as auctioneer, he became agent for both parties, for the purposes for which we consider agency in this Court: he sold the estate, and part of the purchase money was deposited in his hands to hold for both parties; if he had paid it over to either, he would have done it in his own wrong. Under these circumstances both parties make a claim upon him for the money; and he files this bill in order to ascertain *to whom it belongs. I think he is clearly entitled *primâ facie*, to

1818.
Jan. 17.
Gray's Inn
Hall.

[67]

[*68]

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BROTHER
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PRATTENT.

file a bill of interpleader: there are a great many instances in which bills of this description have been exhibited by auctioneers. With respect to the remedy said to be at law, that is a concurrent jurisdiction; and I should not, therefore, dismiss the bill on that account.

[*69] The only question then is with respect to the difficulty arising from one of the parties not being before the Court; but that does not originate with the plaintiff. If a plaintiff in an interpleading bill be active against one defendant, and neglect to proceed against the other, he certainly is not entitled to the assistance of the Court. But no neglect can be imputed here; he has done all which by the practice of the Court he was enabled to do: I must, therefore, consider the case in the same manner as I should *have done if Aitcheson had been before the Court. He is before the Court in point of law, though not in fact; I am, therefore, under the necessity of giving the plaintiff a decree: the plaintiff's costs must be taxed, and paid out of the fund in Court.

Decree for plaintiff.

TAYLOR v. BAKER.†
(Daniell, 71—83; S. C. 5 Price, 306.)

WRIGHT v. BELL.†
(Daniell, 95—104; S. C. 5 Price, 325.)

ATTORNEY-GENERAL v. FREEMAN.†
(Daniell, 117—121; S. C. 5 Price, 425.)

† These three cases, contained both in Daniell and in 5 Price, are commonly cited from the latter, and will be found in vol. xix. in the place corresponding to the report in Price. —R. C.

ROBERTS *v.* ROBERTS.†

(Daniell, 143—153.)

1818.
April 29.
May 17.

[143]

A person executing a deed for the purpose of defrauding the law, cannot come into equity for the purpose of setting it aside, even though the instrument has never been made use of; and, therefore, if A. convey an estate to B. as a qualification to kill game, equity will not compel a re-conveyance.

THE bill was filed by the devisees of one George Roberts, for the purpose of setting aside a voluntary demise of certain hereditaments, for a term of years, executed by the testator in his life-time to the defendant as a qualification to kill game.

The bill stated, that in the month of August, 1815, the testator being possessed of the property in question, which was held by him under a freehold lease for lives, was applied to by the defendant, who was his brother by the half blood, and who represented to him, that it would be very advantageous to him, the defendant, if the testator would execute a conveyance to him of his interest in the property mentioned in the bill; and requested him so to do, under the assurance that the conveyance, when made, should be merely nominal, and that, as to the beneficial interest in the property, he, the defendant, would be a mere trustee for the testator.

That the testator agreed to comply with such request: but upon a most clear and unequivocal understanding that the conveyance was to be nominal, and that the testator was in fact to receive all the rents and profits arising from the property, and was to have the full and absolute ownership and benefit of it; and that such being the agreement and understanding between them, the testator and the defendant both went to the office of Mr. Thomas Price, a solicitor at Worcester, and gave him instructions to prepare such a deed or instrument as he should think proper for carrying their intentions into effect.

That Mr. Price accordingly prepared a deed, which was executed by the testator and the defendant, on the third day of October, 1817. Whereby, in consideration of the natural love and affection which he bore to the defendant, his brother in law,

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† *Taylor v. Bowers* (1876) 1 Q. B. D. 291.

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the testator demised the property in question to the defendant, his executors, administrators, and assigns, for the term of 99 years, if the persons, for whose lives the testator held the estate, should so long live.

That, on the execution of the deed, the testator delivered it to the defendant, in whose possession it had ever since been : but that the testator retained all the title deeds and other writings, relating to the property, in his own possession ; and that neither the defendant, nor any other person, had ever made any use of the deed ; nor was the defendant ever in the occupation or enjoyment of the property, nor did he in any way derive any advantage from the conveyance, the testator having continued in the possession of the premises up to the time of his decease.

The bill then stated the death of the testator, in March, 1816 ; having previously to the execution of the deed in question made a will dated June 18, 1811, under which the plaintiffs claimed ; and that since the testator's death the defendant had commenced an action of ejectment, for the purpose of obtaining possession of the premises under the indenture of demise executed to him by the testator ; and therefore prayed that he might be compelled by the decree of the Court to deliver up the indenture to be cancelled, and to re-convey the premises to the use of the plaintiffs, and for an injunction to restrain the defendant from proceeding in the ejectment.

[*145]

The defendant, by his answer, denied that he had made the proposal mentioned in the bill ; but stated that being for many years past much addicted to field sports, *and not being qualified by estate to kill game, he had been threatened with prosecutions ; and that he, therefore, applied to the testator, who was his brother of the half blood, to qualify him, which the testator agreed to do, and had, for that purpose, executed the deed mentioned in the bill. The defendant, however, denied that the deed was executed for the sole purpose of affording him a qualification to kill game ; but alleged that the testator in executing the same had it also in view to secure the property to the defendant after his decease. He admitted that no use had ever been made of the deed, and that the property had always continued in the possession of the testator.

It appeared by the evidence of Mr. Price who prepared the deed, and of other persons who were present at its execution, that it was prepared by the directions of the testator and the defendant, for the express purpose of qualifying the defendant to kill game; and that, immediately after the execution of it, the testator and the defendant were asked, "whether they knew the nature of it, as it was a dangerous instrument to trust in the hands of any one." Upon which the defendant answered, that "he knew it was only executed to lend him a qualification to kill game," and the testator said, "he knew he could trust the defendant with the deed," whereupon the defendant replied "he hoped so, and that the testator might have the deed again when done with." Several other circumstances were also detailed by the witnesses examined on the part of the plaintiffs, from which it clearly appeared that the intention of the testator, in executing the deed, was merely to give the defendant a qualification.

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ROBERTS.

No evidence was read on the part of the defendant.

An injunction was obtained by the plaintiffs for want of an answer; which, upon the answers coming in, *was continued to the hearing, for which purpose the cause now came on.

[*146]

Mr. Dauncey and *Mr. Joseph Martin* for the plaintiffs, contended, that the object of this deed being to defraud the law, the whole transaction was void, *ab initio*; that although it might in general be true, that a person making a conveyance with a fraudulent view cannot apply to the Court to set it aside; yet that, where the purpose is not completed, the party has a *locus penitentie*, in which he may come to a court of equity for relief. That this principle was laid down by Sir THOMAS PLUMER, V.-C. in *Platmone v. Staple*; † and that, therefore, in the present case, no use having been made of the deed, the plaintiffs were entitled to have it set aside.

Mr. Martin and *Mr. Simpkinson*, for the defendant:

* * It is not pretended that any fraud was practised by the defendant upon the testator. The deed was prepared by his order, and executed by him, with a perfect knowledge of its

† Cooper, 253, as to which see the judgment, *post*, p. 738.

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 v.
 ROBERTS.
 [*147]

effect. The moment the deed was executed, it operated as *a revocation of the testator's will, for the term of years which it created;—what, therefore, is there to sustain the argument of a trust for the plaintiffs?

At all events, the defendants cannot be in a better situation than the testator was in. Now, what was the situation of the testator? Being informed by his brother that informations had been brought against him for shooting game, to prevent farther inconvenience to him, the testator directs this deed to be prepared, in order to defeat an Act of Parliament. What equity can a party making a conveyance, for the purpose of defeating the law, have to be relieved from the effect of his deed. The Court could not, under such circumstances, have raised any trust on his behalf; and if no trust could have been raised for him, it cannot be raised for the present plaintiffs, who are mere volunteers. * * * The law says, that where a man does an act to defraud the intention of the Legislature, he shall suffer all the inconveniences of his act, *Curtis v. Perry*; † here, the testator does all he can to commit a fraud upon the Legislature, or, at least, to enable another person to commit one; and there is no distinction between a man's committing a fraud himself, and his doing what would enable another to commit one.
 * * *

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Mr. Dauncey in reply :

There is no doubt as to the justice of this case. It is quite clear that the testator never meant to part with his property, for any purpose than the one now stated. It is certainly true that these parties were about to do that which the law did not permit; but that object never was obtained. It appears that the defendant never had any occasion to make use of the instrument. It was intended he should have this deed to produce in case any information was laid against him; but he never did produce it. What rule of equity, therefore, is there, which says, that if an instrument is made for a fraudulent purpose, but which purpose is never carried into effect, the party shall not have it in his power to revoke it?

† 6 R. R. 28 (6 Ves. 747).

The testator having made this deed for the purpose of enabling the defendant to do an illegal act, might, before that act was committed, have called for a reconveyance in order to prevent its taking place. This doctrine is confirmed by the case cited by the Lord Chancellor in *Curtis v. Perry*,† which has been cited. If, therefore, this was an illegal act, it was void, and would not operate as a revocation of the will; and the plaintiffs, as devisees under the will, are entitled to the property.

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ROBERTS.

[RICHARDS, Lord Chief Baron: If the deed be void, the plaintiffs want no reconveyance. *They might defend themselves in ejectment; and, if so, I can render them no assistance. So that they are in this situation. The deed, if void, is no revocation of the will, and they might defend the ejectment; and, if it be not void, it is a revocation; and the present plaintiffs are not entitled.]

[*149]

Mr. Dauncey:

The bill states the deed to be in the hands of the defendant, so that, assuming it to be void, there is a ground for a court of equity to interfere, by requiring it to be delivered up.

RICHARDS, Lord Chief Baron :

I do not think that I can interfere in this case, without first referring it to a court of law. My opinion at present certainly is, that it is not void at law; but that is subject to farther consideration. I shall be sorry not to reach the defendant, because it is impossible to say he has acted with any view to honour or honesty. With respect to the case before the Vice-Chancellor, I am afraid his authority in granting an injunction is not greater than that of this Court when they granted the injunction in the present case. I cannot see the distinction there made as to the deed being used or not.

RICHARDS, Lord Chief Baron :

This is a bill filed for the purpose of compelling a reconveyance of an estate, executed by George Roberts the testator, to the

May 17.
Gray's Inn
Hall.

[149]

† 6 R. R. 28.

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v.
ROBERTS.

defendant, who was his half brother. It appears that the conveyance was made for the purpose of giving the defendant a qualification to kill game; and I feel myself at a considerable loss to know in what manner I am to grant relief.

[150] I do not think the plaintiffs are entitled to a re-conveyance. The deed was executed maturely. The grantor knew the effect of it. There was no fraud at the time between the brothers: with respect to them the whole transaction was perfectly fair. But it appears by the evidence that the object of the deed was to give the defendant the appearance of a qualification, and that it was executed for no other purpose; that was a fraud on the law, and I cannot perceive what right that gives the plaintiffs to come into a court of equity to call for a re-conveyance. It is said that nothing was done under the deed; but I cannot see the distinction. Sir THOMAS PLUMER is reported to have acted upon such a distinction: but that was a mere interlocutory order. There is a great difference between an interlocutory order and a decree. All the facts of a case may not be before the court when an interlocutory order is pronounced. I cannot, therefore, act on the authority of that judgment. It appears to me that it is not in the power of a court of equity to call back a deed so given.

[151] It has been urged, however, that the deed is void at law; and I will not shut out that question. If it be void, the plaintiffs have a complete defence at law; and I have no objection to retain the bill for a year, for the purpose of giving them an opportunity of trying the question.†

[152] The plaintiffs claim to be entitled under a will made long before this conveyance; but where a person, after making a will, executes a deed with full knowledge of what he is doing, if the

† Since this case was determined in the Court of Exchequer, the opinion of the Lord Chief Baron has received the sanction of the Court of King's Bench, upon a motion for a new trial of the action of ejectment above-mentioned to have been brought by the defendant in equity against the plaintiff, for the purpose of recovering the possession of the property demised by deed in question. The

action was tried before Mr. Baron Garrow, at the last Midsummer Assizes, for the county of Worcester, when the plaintiff at law obtained a verdict, the learned Judge who tried the cause laying it down that the deed was of no validity in consequence of the circumstances of fraud attending its execution: but a motion was made for a new trial in Michaelmas Term following, and the rule

deed be good, I cannot say it is not a revocation of the will ; and then, if it be a revocation, it is a revocation *pro tanto* and the devisees take only the reversion, as nothing but the reversion passed by the will. If so, the plaintiffs are not entitled to call for a re-conveyance, and the bill cannot be sustained by them. If I dismiss the bill, it will be

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Without costs.

CHERTSEY MARKET, IN THE MATTER OF.†

(Daniell, 174—194; S. C. 6 Price, 261.)

NOEL v. LORD HENLEY.†

(Daniell, 211- 238, (House of Lords) 322—340); S. C. 7 Price, 241;
12 Price, 213.)

BOWMAKER v. MOORE.†

(Daniell, 264—270; S. C. 7 Price, 223.)

OLIVER v. COURT.†

(Daniell, 301—321; S. C. 8 Price, 127.)

was made absolute in Hilary Term last. The Court of King's Bench being of opinion that though the deed was fraudulent, yet that it did not lie in the plaintiff's mouth to say so, as he was a party to the fraud himself.†

† The above cases, contained both in Daniell and in Price, are commonly cited from the latter, and will be found in future volumes in the place corresponding to the report in Price.
—R. C.

† The reporter is indebted for the above note of the case in the King's

Bench, to the kindness of one of the present reporters in that court.

K. B. (AT NISI PRIUS) EASTER TERM.

INMAN v. STAMP.†

(1 Starkie, 12—13.)

1815.

[12]

An agreement to occupy lodgings at a yearly rent, payable quarterly, (the occupation to commence on a future day,) is an agreement relating to an interest in land, within the meaning of the fourth section of the Statute of Frauds.

ASSUMPSIT for not occupying the plaintiff's lodgings pursuant to the defendant's undertaking. For the plaintiff it appeared in evidence, that the defendant had verbally agreed to take apartments in his house, to be entered upon at Christmas, at the annual rent of 26*l.* to be paid quarterly, and that upon the strength of this agreement, the plaintiff had taken down the advertisement of lodgings from his window. On the 24th of December, the day before he was to have taken possession of the lodgings, the defendant announced to the plaintiff his determination to recede from his bargain.

LORD ELLENBOROUGH was of opinion that this was a contract for an interest in land, within the meaning of the fourth section of the Statute of Frauds, and therefore that the agreement was void, but held that it would have been otherwise, if the defendant had entered upon the premises, since that would have been a part-execution of the contract.

Jervis for the plaintiff contended, that the taking down the advertisement at the defendant's request was a part execution.

[13]

But LORD ELLENBOROUGH was of opinion, that since this was done before the time had arrived for taking possession, it made no difference.

† Followed, *Edge v. Stafford* (1831) 1 C. & J. 391.

GLOSSOP *v.* COLMAN AND OTHERS.

(1 Starkie, 25—26.)

1815.
May 17.

[25]

A father who holds out to the world that his son (who is an infant) is his partner, and who sends bills and signs receipts in their joint names, is not precluded, in an action brought in his own name for goods sold and delivered for the purposes of the business, from shewing that he himself was the sole proprietor.

ASSUMPSIT for goods sold and delivered. The defendants were the proprietors of the Haymarket Theatre, and the action was brought to recover the amount of oil and other articles, supplied for the use of the theatre.

The son of the plaintiff was called to prove his case, and upon cross-examination it appeared that at the time when the goods in question were supplied, the plaintiff held out to the world that the son was in partnership with him, and that the father had frequently given receipts in the joint names, that the bills had been made out in the joint names for articles supplied to the theatre, and that the very bill for the articles in question was made out in the same manner. The witness, however, swore that he was not a partner when the goods were supplied, and was then only 17 years of age, and that he had no share in the concern till 1814, when his father gave up the whole of the business in his favour.

It was objected by *Scarlett* for the defendant, that the father had precluded himself from suing alone by holding the son out to the world as his partner, and by signing such receipts.

[26]

Garrow, A.-G. contended, that this was only *primâ facie* evidence, and not conclusive, and that the son being an infant at the time, could not be looked upon as a partner.

Lord ELLENBOROUGH was of opinion, that the conduct of the father in giving receipts, &c. was competent evidence, but thought that it would be going too far to nonsuit the plaintiff upon it: He was willing to reserve the point. His Lordship also said, that though an infant was in general repelled from a

GLOSSOP
v.
COLMAN.

contract of partnership, as being of too hazardous a nature for an infant to engage himself in, yet undoubtedly upon the most ancient authorities, he might make a contract for his own benefit.

Verdict for the plaintiff.

The Court of K. B. on motion made in the ensuing Term, refused a rule *nisi* for a new trial on this ground, but granted it on another.

1815.
May 17.

ROCHER v. BUSER.

(1 Starkie, 27—28.)

[27]

The owner of a vessel is liable for money supplied to the captain in a foreign port, provided the supply be absolutely necessary for the use of the vessel.

ASSUMPSIT for work and labour, and on the common counts.

The plaintiff was a merchant resident at Oporto, and claimed the amount of goods and monies supplied to the captain of the defendant's vessel at Oporto, for the use of the ship.

The *Attorney-General* for the defendant, disputed the items for money advanced to the captain of the vessel, contending, that in point of law, the owner was liable only for necessities supplied for the use of the ship, and not for monies supplied to the captain, to be subsequently appropriated by him; and he also contended, that in fact the monies had not been applied to the use of the ship. The captain (whom Lord ELLENBOROUGH held to be a competent witness), proved generally, that certain sums advanced, had been so applied.

LORD ELLENBOROUGH, Ch. J.:

[*28]

In strictness, a claim of this kind is limited to articles supplied *through necessity. But where the same necessity exists, money may be supplied as well as goods, and the amount recovered, this however must not be understood of an indefinite supply of cash, which the master may dissipate, but only such as is warranted by the exigency of the case, as for the payment

of duties or other necessary purposes. I once held that proof of the strict application of the money to the purposes of the ship was necessary, and Mr. J. HEATH, sitting for the Chief Justice of the Common Pleas, did the same. We are in this case left much in the dark, and I cannot advise you to find more than you may deem to have been absolutely necessary for the use of the vessel.

ROCHER
v.
RUSHER.

Verdict for the plaintiff.

GILES AND HEADINGS v. DYSON AND GREENWELL, ADMINISTRATORS OF SEWARD.

1815.
May 22.

(1 Starkie, 32—33.)

[32]

As against an administrator, debts due to the intestate are not to be considered as assets till actually received, although not stated in the administrator's inventory to be desperate.

As against creditors an administrator cannot be allowed for disbursements, in the schooling, feeding, or clothing of the intestate's children, subsequently to his decease.

Semble, he is entitled to credit for the reasonable charges of collecting the intestate's debts.

After putting in an inventory, it is for the administrator to discharge himself of the items which it contains.

ASSUMPSIT against the defendants as administrators for goods sold and delivered to the intestate. The defendants had severally pleaded the general issue and *plene administravit*. The plea of *plene administravit* was admitted as to Greenwell, but denied as to Dyson.

The defendant Dyson had, in the year 1811, exhibited an inventory in the ecclesiastical court, and the question was, whether the several items of disbursement which it contained were allowable.

Richardson for the plaintiff in the first place contended, that certain debts which the defendant in his inventory allowed to be due to the estate, and which he did not represent to be desperate, were to be considered as actual assets in the defendants' hands, and he cited the case of *Smith v. Davis*, Selw. N. P. 712, where the rule is so laid down, but he admitted that it was competent to the defendant to shew that these debts had not been paid.



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v.
DYSON.
[*33]

(Lord ELLENBOROUGH: You must prove, presumptively at least, that these debts have been paid; that presumption may depend on the time and a *number of other circumstances, but upon the plea of *plene administravit* it is necessary to prove that effects came into the hands of the defendant; this is the universal practice.)

One item of expenditure contained in the inventory, was for cloaths and other necessities provided, and schooling paid for the use of the intestate's children since his death.

(Lord ELLENBOROUGH was of opinion, that such expenses were inadmissible, as against creditors.)

Another item consisted of charges at the rate of 5*l.* per cent. for collecting the debts of the intestate; and upon this and some other items,

Lord ELLENBOROUGH held, that it was necessary for the defendant to prove that the charge was reasonable, it might under particular circumstances be an inadequate remuneration, under other circumstances it might be a most exorbitant charge, and that after the putting in of the inventory, it was for the defendant to discharge himself of the items.

Verdict for the plaintiffs.

The amount of the damages referred.

1815.
May 22.

CRISP v. ANDERSON.†

(1 Starkie, 35—36.)

Against a party who refuses (after notice) to produce an agreement, it is to be presumed that it is stamped.

But the party refusing is at liberty to prove the contrary.

ASSUMPSIT, for work and labour and materials found.

The plaintiff proved work done by him to the amount of near 48*l.*, on board the ship *Brunswick*, for the defendant; and

† *Cloemadec v. Carrel* (1836) 18 *Investment Co. v. Haviside* (1872) C. B. 36, 25 L. J. C. P. 216; *Marine* L. R. 5 H. L. 624.

he also proved that a sky-light had been delivered to the defendant by the plaintiff, which the defendant had sent back, alleging (which was not the fact), that it was made of improper materials.

CRISP
v.
ANDERSON.

The defence was, that by a written agreement between the parties the price of the work, exclusive of the sky-light, was to be 47*l.* and a fraction, one half of which was to be paid when the work was done, and the other at a period which had not then expired, and that as the defendant had paid more than one half, *i. e.* the sum of 24*l.* into court, and as the plaintiff had not proved any order for the sky-light, the plaintiff ought to be nonsuited.

This agreement having been proved, the *Attorney-General* for the plaintiff proposed to give in evidence, a copy of an agreement relating to the sky-light, the original having been shewn to be in the hands of the defendant.

Campbell objected, that before an unstamped copy could be read, it was necessary to prove that the original agreement was stamped.

[36]

(Lord ELLENBOROUGH: Am I to presume that this agreement is unstamped in favour of a defendant who refuses to produce it; I ought rather to presume *omnia rite acta* particularly after notice. I shall assume it to have been stamped until the contrary appear.)

The witness then stated, that the original was not stamped, and the evidence was rejected,

The Court intimating an opinion, that as the defendant had returned the sky-light, not on the ground that he had not ordered it, but on the ground that it was made of improper materials, he had thereby admitted the order.

Campbell objected, that the oral evidence on this head was

CRISP
v.
ANDERSON. inadmissible, since it appeared that a written agreement existed concerning the subject matter.

LORD ELLENBOROUGH:

I do not know that the agreement regulates the price, and I cannot presume any thing upon the subject.

The plaintiff had a verdict for the value of the sky-light.

K. B. (AT NISI PRIUS) TRINITY TERM.

1815.
June 20.

JAGGERS v. BINNINGS AND ANOTHER.

(1 Starkie, 64—65.)

[64]

A. and B. are partners, and part-owners of a vessel. An admission by A. as to a subject of part ownership, but not of co-partnership, is not binding on B.

ACTION against the defendants as part-owners for seamen's wages.

The question arose, whether A. and B. being partners, and also part-owners of a vessel, the admission of A. as to a subject of co-partnership, but not of copartnership was binding upon B.

[65]

LORD ELLENBOROUGH ruled that it was not.

1815.
June 28.

NICHOLLS v. DOWDING AND KEMP.†

(1 Starkie, 81—82.)

[81]

Primâ facie evidence of a partnership having been given, the declaration of one partner is evidence against another partner.

ASSUMPSIT on bills of exchange, and for goods sold and delivered.

Primâ facie evidence of a partnership having been given,

† Partnership Act, 1890, s. 15.

Garrow, A.-G. inquired into declarations by one of the defendants for the purpose of binding the other, which, upon the objection taken, he contended he had a right to do, since otherwise the evidence would be excluded altogether.

NICHOLLS
v.
DOWDING.

LORD ELLENBOROUGH :

[82]

I think the evidence is admissible : the case is analogous to that of conspiracy, where, after a foundation has been laid, what has been said by one is evidence against the rest.

DOE v. PAYNE.

(1 Starkie, 86—87.)

1815.
July 1.

In ejectment on a clause of re-entry in case the tenant should assign, set over, or otherwise let the demised premises, it is not sufficient to prove the defendant a stranger in possession of the demised premises, and his declaration that they were demised to him by another stranger.

[86]

And such evidence would not be sufficient, even if the tenant had covenanted not to part with the possession.

EJECTMENT on a clause of re-entry contained in a lease to one Dyer for breach of his covenant, "Not to assign, set over, or otherwise let the demised premises."

The lessor of the plaintiff proved that the defendant Payne was in possession of the premises, carrying on his business there, having placed his name over the door, and that Payne had said that he took the premises from two of the directors of the Commercial sale room.

[87]

LORD ELLENBOROUGH :

This does not prove that Dyer either assigned or let, and it is incumbent on the lessee of the plaintiff to shew that he did either the one or the other.

Upon this evidence *non constat* that Payne was not a tortious intruder. It does not appear who the directors of the commercial sale room are ; and for ought that appears, Dyer may have been unwilling to be turned out of possession. This evidence would not be sufficient even though Dyer had covenanted not to part with the possession.

Plaintiff nonsuited.

1815.
July 1.

DE TASTET *v.* CARROLL.

(1 Starkie, 88—90.)

[88]

A transfer of property made on the eve of bankruptcy, but under the apprehension that a degree of force, civil or criminal, is about to be applied, is valid.

A transfer by one of two partners on the eve of bankruptcy, under circumstances which overcome the free will of the party, such as the apprehension of a prosecution for forgery, is valid.

TROVER against the assignees of Parry and Latham, bankrupts, to recover the value of a large quantity of rum, sugar, &c.

The question was, whether Parry in transferring this property to the plaintiff had thereby given him a voluntary and fraudulent preference?

Parry committed an act of bankruptcy on the 17th of January, 1813, he had before then been employed by the plaintiff to purchase rum and other articles for him to a very large amount; and on the 14th of January, he had property which stood at the Custom-house in his own name, but which had been purchased on the plaintiff's account to the amount of 60,000*l.* On the 14th, it appeared by the confession of Parry, that a bill of exchange purporting to have been accepted by Marden, for the sum of 22,000*l.* and which had been deposited by Parry with De Tastet as a security, was a forgery. Upon this discovery, Mr. De Tastet, exceedingly alarmed for the fate of his property, insisted upon its being immediately transferred, and it was accordingly transferred to him on the 14th and 15th days of January.

[89]

LORD ELLENBOROUGH observed to the jury:

Formerly the act of bankruptcy drew the line of separation between that property which might be disposed of by the bankrupt, and that which vested in the assignees. But it occurred to those who presided in the Courts, that it was unjust to permit a party on the eve of bankruptcy to make a voluntary disposition of his property in favour of a particular creditor, leaving the mere husk to the rest; and therefore that a transfer made at such a period, and under such circumstances as evidently shewed that it was made in contemplation of bankruptcy, and in order to favour a particular creditor, should be inoperative. But

the rule was not meant to debar a creditor from using such means as were in his power for compelling satisfaction of his claim, but merely to exclude a voluntary and fraudulent preference. The question for your consideration is, whether the transfer was voluntary, or made under the apprehension that a degree of force, civil or criminal, was about to be applied.

DE TASTET
v.
CARROLL.

Garrow, A.-G. submitted that it was not competent to Parry, under an apprehension of a prosecution for forgery, to deal with the goods of his partner, and that the jury should be directed to find whether it was under this apprehension that the transfer was made; but

Lord ELLENBOROUGH was of opinion that every thing which might overcome the free-will of the party, was sufficient to exclude a voluntary preference; *and that Parry, as a partner, had the power of disposing of the partnership property.

[*90]

Verdict for the plaintiff.

In the ensuing Term, the Court of K. B. refused a rule *nisi* for a new trial.

K. B. (AT NISI PRIUS) MICHAELMAS TERM.

BURN *v.* PHELPS.

(1 Starkie, 94.)

1815.

[94]

A. lets lands to B., who underlets to C. and others; during these tenancies, A. gives notice to C. and the other under-tenants to quit, and C. does quit, and the lands before occupied by him remain unoccupied for a year, and are then again let by B.; A. cannot recover against B. for the use and occupation of this land for the year. And *semble* under these circumstances, an eviction might be pleaded to the whole demand.

ASSUMPSIT for use and occupation.

The defendant being tenant to the plaintiff of premises in Worcestershire at 190*l.* per annum, under-let the premises to

BURN
v.
PHELPS

Badger and several other under-tenants; during this tenancy and the under-tenancies, the plaintiff gave notice to Badger and the other undertenants to quit, and Badger had in fact quitted, and the premises occupied by him worth 60*l.* per annum remained unoccupied for one year; at the expiration of the year Phelps again under-let them to another tenant; and he still continued in possession of the whole by his under-tenants; the defendant had paid into Court a sum which covered all the rent claimed except the 60*l.*, which he insisted upon was not due to the plaintiff.

Lord ELLENBOROUGH was of opinion, that under the circumstances the plaintiff was guilty of an eviction as to the premises occupied by Badger, at the least, and suggested that an eviction might have been pleaded to the whole demand. Upon signifying this opinion to the jury, the

Plaintiff elected to be non-suited.

LANE v. APPLEGATE.†

(1 Starkie, 97—98.)

1815.
Dec. 5.

*At Wrat-
minster.*
[97]

Action for words imputing a crime; an agreement on the part of the plaintiff, to waive his action for words spoken, in consideration that the defendant will destroy certain documents in his possession, or which might afterwards come into his possession, imputing the same crime to the plaintiff, is (when executed by the burning of the papers in his possession) a bar to the action, and may be given in evidence under the general issue.

CASE for words imputing a charge of an unnatural crime. Plea, the general issue.

The words were proved. On the part of the defendant, it appeared that the defendant and her late husband having succeeded to the occupation of a house, formerly occupied by the plaintiff, had become possessed of certain letters, purporting to contain proofs against the plaintiff, of an offence of the nature

† Cited and followed by MARTIN, C. 484, 34 L. J. Ex. 65.—R. C. B. in *Bosey v. Wood* (1865) 3 H. &

charged ; it also appeared that the plaintiff after the speaking of the words, entered into a written agreement with the defendant, which stated that the plaintiff had burnt one of these letters, and was then to destroy another, and that she had undertaken to destroy all other letters of the same kind which might subsequently come into her possession ; and that the plaintiff and defendant had mutually agreed not to bring actions against each other on any ground connected with these charges or letters.

LANE
C.
APPELATE.

Lord ELLENBOROUGH, Ch. J. was of opinion, that this agreement was a bar to the action, as an accord and satisfaction, and was evidence under the general issue.

[98]

A juror was withdrawn by agreement.

DRURY v. MOORE.

(1 Starkie, 102—103.)

1815.
Dec. 7.

Evidence that the lord of a manor has from time to time erected houses to the exclusion of those claiming a right of common, is not to be placed in competition with evidence of long enjoyment, coupled with an acknowledgment of the defendant, the lord of the manor by deed, that the confirmation of the commoners was essential to an alienation of part of such common.

[102]

CASE against the defendant for excluding the plaintiff from the enjoyment of a common right on Hadley Common, to which he was entitled as appurtenant to a certain messuage and lands.

The defendant was lord of the manor of Hadley, and had lately enclosed Hadley Green.

[103]

The plaintiff proved enjoyment of the common by himself and those under whom he claimed, by the evidence of very old witnesses. He also proved that in 1800, a mill having been built on a part of the green, for charitable purposes, an indenture had been executed by Mr. Moore and others, by which Mr. Moore granted the land, subject to the confirmation of the commoners.

Park for the defendant stated, that he was able to prove

DEURY
v.
MOORE.

that the lords of the manor had from time to time, from a very ancient date, taken and leased parts of the green, upon which houses had been built, to the total exclusion of the commoners.

LORD ELLENBOROUGH :

I am ready to receive such evidence, which tends to shew an unqualified right in fee-simple, but in the result I think it will be of no avail. Lords of manors continually encroach upon the rights of commoners, but such evidence, when weighed against long enjoyment, and the solemn deed of the party, would prove as light as a feather in the scale.

Verdict for the plaintiff.

1815.
Dec. 9.

OKELL v. SMITH, AND ANOTHER.

(1 Starkie, 107—109.)

[107]

Where utensils to be used in trade have been contracted for and delivered at a stipulated price, it is a question for the jury, whether the vendee, who complains that they are unfit for the purpose for which they were intended, has used them further than was necessary, in order to give them a fair trial.

And if not, the commodity being bulky, and after a reasonable trial found to be unfit for such purpose, the vendor upon notice given, is bound to take them away ; but if the vendee retain the utensils, without giving such notice, he is liable to pay for the value of the materials.

ASSUMPSIT for the price of 16 copper pans.

These pans had been made by the plaintiff under a contract, by which he engaged that they should be sound, and be made of the best materials, to be paid for at a certain stipulated price, by bill at two months.

The defendants after five or six trials, found that the pans were not sound, and would not answer the purpose for which they were intended ; viz. the manufacture of vitriol.

Park for the plaintiff contended, that the defendants having used the pans several times, were precluded from disputing the payment at the rate stipulated for. But

[108]

BAYLEY, J. held, that it was a question for the jury, whether

the defendants had used the pans more than was necessary, in order to give them a fair trial.

OKELL
v.
SMITH.

Park for the plaintiff, assimilated the case to that of *Morgan v. Richardson*,† and as the agreement was for an entire sum, contended that the defect in the pans was properly the subject of a cross action; and he attempted to distinguish the case from that of *Farnsworth v. Garrard*,‡ and others of that description, where the articles were wholly unfit for use.

The *Attorney-General* and *Campbell* answered, that in *Morgan v. Richardson*, a bill of exchange was given. In *Fisher v. Samuda*,§ where a wall had been built so improperly that no benefit whatever had been derived from the service, it was held that the plaintiff was not entitled to recover even the value of the brick and mortar, and in general where the article is bulky, it is not necessary to return it, it is sufficient to give notice to the other party.

BAYLEY, J. :

The plaintiff certainly is not entitled to recover the full price stipulated for by the contract, according to which he was bound to furnish pans capable of answering the purposes *for which [*109] they were ordered. If the defendants after giving them a reasonable trial, found them insufficient for the purpose, and gave notice to that effect, to the plaintiff, he was bound to take them away, and they remained at his risk; but if no notice was given, but the defendants retained the pans, they are liable to pay as much as the materials are worth.

The action was afterwards referred.

† 10 R. R. 624 n. (1 Camp. 40 n.). § 1 Camp. 190.

‡ 10 R. R. 624 (1 Camp. 38).

1815.
Dec. 15.

ELTON v. JORDAN.

(1 Starkie, 127.)

[127]

An infirmity which renders a horse less fit for present use and convenience is an unsoundness; it is not essential that the infirmity should be of a permanent nature.

ACTION on a warranty of a horse.

The evidence of the plaintiff's and defendant's witnesses was very contradictory; but one of the witnesses for the defendant admitted that he had bandaged one of the fore legs of the horse, but not the other, because the one was weaker than the other. The horse had been warranted sound.

LORD ELLENBOROUGH:

To constitute unsoundness, it is not essential that the infirmity should be of a permanent nature; it is sufficient if it render the animal for the time unfit for service, as for instance, a cough, which for the present renders it less useful, and may ultimately prove fatal. Any infirmity which renders a horse less fit for present use and convenience, is an unsoundness.

The jury found accordingly.

1815.
Dec. 22.

ROWE v. OSBORNE.†

(1 Starkie, 140—142.)

[140]

A vendee of goods is bound by the contract, as stated in the note signed by him, and delivered by the broker who effected the sale to the vendor, although this note varies from the note delivered by the broker to the vendee.

It is a question for the jury, whether the vendee of goods which turn out to be of a quality inferior to that which was stipulated for has in point of fair mercantile dealing given a notice sufficiently early to the vendor of his intention to repudiate the contract.

ASSUMPSIT on a special agreement for the purchase of a quantity of bacon; breach alleged in not accepting bills of exchange in payment, according to the agreement.

† It does not appear that this case is inconsistent with the actual decision in *Thornton v. Kempster*, 15 B. R. 658 (5 Taunt. 786), where both notes were signed by the broker.

See also the analysis of the cases by ERLE, J. in *Sievwright v. Archibald* (1851), 17 Q. B. 102, 20 L. J. Q. B. 529.—R. C.

The contract was made between the defendant, a trader in London, with the plaintiff, a dealer in Ireland, through the medium of Penny, a broker, who delivered a note to the plaintiff signed by Osborne in the following terms :

ROWE
f.
OSBORNE.

“ March 28, 1815.

“ Bought of Rowe & Co., through Thomas Penny, 100 bales of prime singed bacon, at *56s. per cwt. free on board ; weight 24 to 28 per 10 bales, to be shipped next month, and drawn for 60 days, from the date of the bill of lading ; warranted weight upon landing ; deficiency, if any, to be settled by Mr. Penny.”

[*141]

The *Attorney-General* for the defendant, objected that the declaration, which stated the clause as to deficiency as part of the contract, varied from the contract, since the note of the contract sent to the defendant, by which alone, as he contended, the defendant was bound, contained no such stipulation.

But Lord ELLENBOROUGH was of opinion, that the note of the contract given in evidence, and which was signed by the defendant, was evidence against him, that this was the real contract.

The bacon arrived in the port of London on the 25th of May, and on the 19th of July, and upon a subsequent day, many bales were opened, and it appeared that the bacon was not of the quality described ; viz. prime singed bacon, but ill cured, and that a considerable portion of it was unfit for use ; the defendant, however, made no objection on this score, and communicated no information to the plaintiff on the subject till the 27th of November following.

Lord ELLENBOROUGH informed the jury, that if they were of opinion that the bacon was not of the *quality contracted for, they were to consider whether in point of fair mercantile dealing, the defendant was not bound to give earlier notice of his objection to the plaintiff, in order that the latter might have taken steps to redeem himself, and whether he was not bound to give immediate information to the seller, as soon as he discovered the defect, or at all events, to repudiate the contract at an

[*142]

ROWE
v.
OSBORNE.

earlier period, and that they were to give for their verdict accordingly.

The jury afterwards with the permission of the Court, inquired of the witnesses how much the value of the bacon sent, fell short of the value of such as had been contracted for, and gave a verdict, making an

Abatement accordingly.

K. B. (AT NISI PRIUS) HILARY TERM.

1816.
Feb. 5.

LIEBMAN AND OTHERS v. POOLEY AND OTHERS.

(1 Starkie, 167—168.)

[167]

After notice to produce a letter written by the plaintiff to the defendant, parol evidence of its contents may be given by any one who recollects the contents, although it is in the plaintiff's power to produce the clerk who wrote the letter.

But in such case the contents cannot be proved by the production of a copy of the original copy.

ASSUMPSIT for commission on the sale of goods and on the money counts.

After having proved notice to the defendants to produce a letter written to them by the plaintiffs, a witness was called to give parol evidence of its contents, who stated that the original had been written not by himself, but by a clerk, who was still in the plaintiffs' service.

Scarlett, for the defendants, objected that the witness ought not to be permitted to swear that the writing produced was a copy of the original letter, since better evidence might be derived from the clerk who wrote the original, and who ought to have been called ;—but

Lord ELLENBOROUGH was of opinion, that the testimony of this witness was admissible ; since it was merely contingent and uncertain whether the clerk who wrote the original would, when called, possess a better recollection on the subject than the witness already produced.

Upon farther inquiry, it appeared, that the writing intended to be given in evidence as a copy of the original was in itself a copy of the original copy, which remained in the counting-house of the *plaintiffs. Upon the objection being taken that at all events the original copy ought to be produced ;

LIEBMAN
v.
POOLEY.

[*163]

Lord ELLENBOROUGH acceded to the objection, observing that the evidence now offered was one step farther removed from the original.

The plaintiffs, proving their case by other evidence, obtained

A verdict.

FORSDICK v. COLLINS.

(1 Starkie, 173—174.)

1816.
Feb. 13.

One who comes into possession of land, on which he finds a block of stone belonging to another, is not justified in removing it to a distance.

[173]

And such removal supersedes the necessity of proving a formal demand in an action of trover.

TROVER for the value of a block of Portland stone.

The stone had been placed by the plaintiff on the land adjoining some shells of houses, which he had purchased in Hunter Street. The defendant afterwards coming into possession of the land, refused to permit the plaintiff to carry the stone away, and afterwards removed it himself to Burton Crescent Mews.

Puller for the defendant, contended, that he had a right to remove it from his own premises.

LORD ELLENBOROUGH :

But he is not justified in removing it to a distance. In an action of trespass at the suit of the owner, he must in his justification have alleged, that he removed it to some adjacent place for the use of the owner ; he could not have justified this removal.

Puller insisted that no sufficient demand had been proved.

[174]

FORSDICK LORD ELLENBOROUGH :

^{r.}
COLLINS.

A demand is unnecessary where the party has been guilty of a conversion, and he is guilty of a conversion where he oversteps the authority of law; here the defendant overstepped that authority by removing the property to a distance.

Verdict for the plaintiff.

1816.
Lib. 15.

LEESON v. HOLT AND OTHERS.†

(1 Starkie, 186—188.)

[186]

In an action against a carrier for negligence, the defendant cannot read in evidence an advertisement in a newspaper, by which he limits his responsibility, unless he first prove that the plaintiff was in the habit of reading that paper.

THIS was an action against the defendants as common carriers, for negligence.

The plaintiff, who resided at Nottingham, ordered a number of chairs to be sent by Davis from London. Davis accordingly sent the chairs, and he stated upon the trial, that he went to the defendants' office in London, and that he had not seen any notice on the part of the defendants, intimating that they would not be responsible for any damage which might be sustained by furniture, &c.

The defendants relied on a notice painted upon canvas in large letters, intimating that all packages of looking-glass, plate-glass, household furniture, toys, &c. were to be entirely at the risk of the owners as to damage, breakage, &c. This notice was placed in a conspicuous situation over the door of the office; they also proposed to prove, that a similar notice had been inserted in the *Gazette*, and in the *Times* newspaper.

Lord ELLENBOROUGH said, that he would receive evidence of the advertisement in the *Gazette*, but that unless it were proved that the party was in the habit of reading the *Gazette*, the evidence [*187] would be of little avail. And his Lordship was of opinion, *that

† This is one of the cases before the Carriers Act, 1830; but is important as showing that, even apart

from section 4 of that Act, it was necessary to prove a special contract. —R. C.

the advertisement in the *Times* was not admissible at all without proof that it was taken in by the party. The first instance in which such evidence was received, was a case where a person to entitle himself to a more extended lien than the common law allowed, inserted a notice in a provincial Sunday paper, and the Court held that it was admissible in evidence, because it was probable that the party had seen it since he took in the paper and the advertisement related to his business.

LEESON
v.
HOLT.

It appeared that Davis had occasionally read the *Times* newspaper, and Lord ELLENBOROUGH then admitted the advertisement contained in it to be read.

In summing up to the jury, his Lordship said :

If this action had been brought twenty years ago, the defendant would have been liable, since by the common law a carrier is liable in all cases except two, where the loss is occasioned by the act of God, or of the King's enemies using an overwhelming force, which persons with ordinary means of resistance cannot guard against. It was found, that the common law imposed upon carriers a liability of ruinous extent, and in consequence qualifications and limitations of that liability have been introduced from time to time, till, as in the present case, they seem to have excluded all responsibility whatsoever, so that under the terms of the present notice if a servant of the carrier's had in the most *wilful and wanton manner destroyed the furniture entrusted to them, the principals would not have been liable. If the parties in the present case have so contracted, the plaintiff must abide by the agreement, and he must be taken to have so contracted if he chooses to send his goods to be carried after notice of the conditions. The question then is whether there was a special contract. If the carriers notified their terms to the person bringing the goods by an advertisement, which, in all probability, must have attracted the attention of the person who brought the goods, they were delivered upon those terms ; but the question in these cases always is whether the delivery was upon a special contract.

[*188]

Verdict for the plaintiff.

1816.
Feb. 20.

MACFARLANE v. PRICE.†

(1 Starkie, 199—201.)

[199]

In the specification of a patent for an improved instrument, it is essential to point out precisely what is new and what is old, and it is not sufficient to give a general description of the construction of the instrument without making such distinction, although a plate is annexed containing a detached and separate representation of the parts in which the improvement consists.

THIS was an action upon the case, for infringing a patent.

The patent was described generally as a patent for certain improvements in the making of umbrellas and parasols.

The specification professed to set out the improvements as specified in certain descriptions and drawings annexed.

[200]

The subjoined description contained a minute detail of the construction of umbrellas and parasols, partly including the usual mode of stretching the silk of the umbrella by means of metallic stretchers, or rods attached to a tube movable along the stem, and also certain improvements, which consisted chiefly in the insertion of the stretchers, which were knobbed at the end, in sockets formed in the whalebone, instead of attaching them to the whalebone in the usual way, by means of forked ligaments, which came in contact with the silk. The advantage of which was, that by the specified mode, the bone being interposed between the stretcher and the silk, the stretcher did not wear the silk in spreading the umbrella, as it was apt to do in umbrellas of the old construction, where the stretcher came in contact with the silk. Some other advantages of minor importance were also stated, and drawings were given of the umbrellas and parasols in their improved state. Throughout the whole specification no distinction was made between what was new and what was old.

Upon the objection taken by *Topping* for the defendant ;

The *Attorney-General* for the plaintiff, contended, that the

† See *Macfarlane v. Price*, 1 Web. quirement, 46 & 47 Vict. c. 57, s. 5 Pat. Ca. p. 74. Observe now that the (5).—R. C.
“claim” is an express statutory re-

specification was sufficient, since one of the annexed drawings contained a representation of the particular invention which had been pirated, and was confined to the exhibition of the insertion of the knobbed stretchers in the whalebone sockets, *from which an artist would be able to construct an umbrella on the improved plan.

M^r. FARLANE
v.
PRICE.

[*201]

LORD ELLENBOROUGH :

The patentee in his specification ought to inform the person who consults it, what is new, and what is old. He should say my improvement consists in this, describing it by words if he can, or if not by reference to figures. But here the improvement is neither described in words nor by figures, and it would not be in the wit of man unless he were previously acquainted with the construction of the instrument to say what was new and what was old. The specification states, that the improved instrument is made in manner following: this is not true, since the description comprises that which is old, as well as that which is new. Then it is said, that the patentee may put in aid the figures, but how can it be collected from the whole of these in what the improvement consists? A person ought to be warned by the specification against the use of the particular invention, but it would exceed the wit of man to discover from what he is warned in a case like this.

Plaintiff nonsuited.

LORD COCHRANE v. SMETHURST.†

(1 Starkie, 205—208.)

1816.
Feb. 22.

A patent for an improved mode of lighting cities, towns, and villages, is not supported by a specification describing an improved lamp.

[205]

Action for infringing the plaintiff's patent.

The patent was granted "for an improved method of lighting cities, towns, and villages."

From the specification it appeared, that this object was intended to be effected by means of a lamp of a new and very

† See also Dav. Pat. Ca. p. 354.

LORD
COCHRANE
v.
SMETHURST.

[*206]

ingenious and simple construction; in some respects the patent lamp was similar to Argand's, the atmospheric air was introduced *by a tube, and brought into immediate contact with the flame, but instead of the glass chimney which is essential to Argand's lamp, a metallic tube, called the eduction-pipe, was placed perpendicularly over the flame, and after passing through the roof of the case communicated with the external air. The advantage of this construction was, that the heated air was forced with considerable rapidity through the eduction-pipe, and having been conveyed to the exterior of the case could not return into the case (which was termed the line of exclusion,) and the flame was perpetually fed by a current of fresh atmospheric air. In Argand's lamp a current of fresh air was also produced by means of the glass chimney placed over the flame, but this was inapplicable to the purpose of lighting a street, since if placed in a case the vitiated air confined in the case would again come into contact with the flame, and the combustion would in consequence be less rapid. Another advantage was, that the metallic tube of the patent lamp could be brought nearer to the flame than the glass chimney of Argand's lamp, and in consequence the draught was more rapid and the return of the vitiated air more completely excluded. The new principle in which the improvement consisted was very clearly exhibited by means of a figure representing the case called the line of exclusion, and the admission and eduction pipes. The application of the principle was also exhibited in many descriptions and plates, shewing how the improved lamp might be used ornamentally and usefully in lighting not only streets *but churches, theatres, &c. of which various applications the patentee in his specification claimed the benefit.

[*207]

It clearly appeared from the plaintiff's evidence, that the use of the eduction-pipe was new and very useful; and it also appeared that the defendant, to whom Lord Cochrane had confided his secret, and whom he had employed as being a skilful artist in making lamps for the purpose of experiment, had availed himself of the invention.

The following objections were made to the patent and specification:

1. That the patent was too large and indefinite in its terms,

being for an improved mode of lighting, &c. without taking any notice of any improvement of any lamp, &c.

LORD
COCHRANE
v.
SMETHURST.

2. That the specification was larger in its terms than the patent, the latter being for an improved mode of lighting cities, towns, and villages, the former claiming the benefit of its application to lighting churches, theatres, &c.

3. That the patentee had not sufficiently defined what he meant by the line of exclusion.

4. That it had not been specified that the outward air should be excluded from the case, except as to the portion which was conveyed through the admission pipe, in order to feed the lamp.

5. That upon the evidence it appeared, that the improvement rested entirely upon the combination of parts known before, but in the specification the *plaintiff claimed the benefit of each part separately, viz. 1. The admission-pipe; 2. The eduction-pipe; 3. The line of exclusion; 4. The mode of raising the burner, without stating a claim for the whole together.

[*208]

LE BLANC, J. :

I am of opinion that the patent cannot be sustained. The plaintiff has obtained his patent not for an improved street-lamp, but for an improved method of lighting cities, towns, and villages; but from the specification it appears, that the invention consists in the improvement of an old street-lamp by a new combination of parts known before. The patent, therefore, is too general in its terms; it should have been obtained for an improved street-lamp, and not for an improved mode of lighting cities, towns, and villages.

Plaintiff nonsuited.

1816.
March 4.

DICKSON v. LODGE.

(1 Starkie, 226—227.)

[226]

In an action on a policy on goods, the bill of lading signed by the captain is not evidence to prove the plaintiff's interest in the goods.

An allegation that the policy has been effected for the plaintiffs by A., B., and C., is satisfied by proof that it was effected by the firm A. and B., there being in fact two firms which have two members in common.

ASSUMPSIT on a policy of insurance on a cargo of linen, deals, &c. on board the *Cuba*, on a voyage from Gottenburgh to the Havannah in 1813.

The plaintiff had admitted that he had effected insurances on the cargo, to the amount of 17,000*l*.

In order to shew that the goods insured were shipped on board the *Cuba* on the plaintiff's account, the bill of lading was tendered in evidence.

Lord ELLENBOROUGH rejected it as being nothing more than the declaration of the captain.

[*227] The plaintiff then proved, that some deals and linen had been put on board, but was not prepared *to shew the amount, and it was admitted that this would entitle him to nominal damages.

The plaintiff having closed his case :

Garrow, A.-G. for the defendant, objected, that it had not been proved as alleged, both in the policy and in the declaration ; that the policy had been effected by Gray, Wilson, & Co. as the agents of the plaintiff, and that the plaintiff having now closed his case, was precluded from going into farther evidence ; but upon its appearing that the defendant had agreed to admit the subscription to the policy, Lord ELLENBOROUGH permitted the plaintiff to go into farther evidence. It then appeared that directions having been given to Gray, Wilson, & Co. a London house, to effect the policy, it had been effected by the Liverpool house of Gray & Co., which consisted of the same component members with the London house omitting one.

Lord ELLENBOROUGH held, that if the two houses had had one member only in common, the policy would have been properly effected.

DICKSON
v.
LODGE.

Verdict for the plaintiff.

MITCHELL AND ANOTHER v. GLENNIE AND OTHERS.
(1 Starkie, 230—232.)

1816.
March 4.

[230]

The owner of a ship is liable for stores and necessaries supplied by the order of the supercargo, after the detention and liberation of the vessel by a foreign power, although the supplies are afforded after an abandonment by the owner to the underwriters. And although the supplies are furnished for the purpose of enabling the vessel to prosecute a second voyage, in the prosecution of which she is seized by British officers and confiscated, yet the institution of proceedings in the Admiralty Court by the defendant to recover possession of the vessel, amounts to an adoption of the second voyage, and renders him liable for the amount.

ASSUMPSIT for stores and necessaries furnished for the defendants' vessel.

In January, 1813, the defendants dispatched the *San Nicolai* on a voyage to Pensacola, with a supercargo on board, who was instructed to do his best for the safety of the ship.

On the return of the vessel from Pensacola she was captured by an American vessel, and carried into St. Mary's, Georgia. The supercargo, by the advice of those to whom the defendants had referred him, applied to the plaintiffs for their assistance in procuring the liberation of the vessel.

The cargo was confiscated, but the vessel was directed to be released. An appeal having been entered against the release, the plaintiffs procured the ship to be liberated on bail, and afterwards furnished her with all necessaries, and also procured a valuable freight. She afterwards proceeded to Bermudas, where she was seized by British officers, and condemned.

[231]

Garrow, A.-G. for the defendants, contended, that since the defendants, after notice of the capture had abandoned to the underwriters, they were not liable for any supplies subsequent to the abandonment, and that the sum which had been paid into court was sufficient to cover the amount of the supplies antecedent to the abandonment.



MITCHELL
v.
GLENNIE.

But Lord ELLENBOROUGH was of opinion, that—whatever claim might be made by the defendants upon the insurers—with respect to the plaintiffs, the defendants, when the ship was liberated, were liable just as they were before the detention, and were therefore bound by the act of their supercargo, who had authority from them to do his best for the ship.

The *Attorney-General* then contended, that at all events the plaintiffs were not entitled to recover for the supplies to enable the ship to proceed on a second voyage, which, from the subsequent confiscation, appeared to have been illegal.

[232] LORD ELLENBOROUGH :

That certainly may be a material dividing point. The authority delegated by the owners only extended to the doing of that which could legally be done, and they are not bound by the illegal acts of their agents.

It afterwards appeared, that the defendants had instituted proceedings in the Admiralty Court to recover possession of the vessel.

Lord ELLENBOROUGH held, that this amounted to an adoption of the second voyage, and made the defendants liable down to the last moment.

Verdict for the plaintiffs.

1816.
March 6.

NELSON v. MACINTOSH.

(1 Starkie, 237—239.)

[237]

The captain of a vessel who carries the goods of another, though not for hire, is bound to take prudent care of them. And if he intermeddle with the chest of a seaman, who has been casually left behind, he is bound to restore it to its former state of security, particularly if the contents are valuable.

CASE for so negligently carrying the plaintiff's box, containing doubloons, dollars, and other valuables, that the box and its contents were lost; the declaration also contained a count in trover.

NELSON
v.
MACINTOSH.

The plaintiff came on board the *Arundel*, of which the defendant was captain, at Trinidad, with intent to work his passage home, but being casually on shore at the time when the convoy made signal for sailing, was left behind. The plaintiff's box was stowed along with others on the quarter-deck, and soon after the departure of the vessel was opened by the defendant, upon a suggestion that it might contain contraband goods. The box was fastened with a lock, and the lid was also nailed down; as soon as the contents had been ascertained the lid was replaced and nailed down again with two large nails. Towards the termination of the voyage, the captain again opened the trunk in the presence of several passengers, and the contents having been put into a canvas bag were deposited in the captain's chest in the cabin, in which his own valuables were usually kept. When the vessel arrived at Gravesend, a river pilot was taken on board, and the captain and one mate left the vessel, another mate remaining on board; an excise officer was also on board, and two young men belonging *to the vessel were allowed to sleep in the cabin. On the next morning the captain's trunk containing the valuables was missing, and was not afterwards discovered.

[*238]

The defendant adduced evidence tending to shew, that the property had been stolen by persons unconnected with the vessel.

Lord ELLENBOROUGH, in his address to the jury, said, Every person who delivers goods to another to be carried for hire has a right to the utmost care; the carrier stands in the situation of an insurer, and is liable for all losses except those which are occasioned by the act of God or of the King's enemies, and where a person does not carry for hire, he is bound to take proper and prudent care of that which is committed to him. Such would have been the situation of the parties if no alteration had been made in the state of the box, but when the captain, from motives of prudence opened the box, he was bound to intermeddle so as to replace it in its former state of security, and to restore all the guards with which it had before been protected. In this case the defendant by his conduct exposed the property to peril and



NELSON
v.
MACINTOSH.

[*239]

risk, and the value of the property imposed upon him an enhanced duty of vigilance, that his acts might not operate to the prejudice of the party. When he had ascertained the valuable nature of the property it was a duty imperative upon him to restore it to at least its former degree of security. Now what was done in this case? as *they approached the land, the property was taken out of the box and put into a canvas bag. When the defendant had taken it wholly out of the box he was bound to make his own trunk in which it was deposited as secure as possible, it was no longer the box of a seaman working his passage home, but ascertained to be an article of great value which the defendant was therefore bound to watch with great care and diligence. His Lordship, after farther commenting on the circumstances of the case, left it to the jury to consider

1st. Whether the captain had not, under the circumstances, by the intermeddling and removal, imposed on himself the duty of carefully guarding against all perils to which the property was exposed in consequence of the alteration.

2ndly. Whether he had in fact carefully guarded the property, and that if they were of opinion that the conduct of the defendant had imposed upon him the duty of carefully guarding the goods, and that he had been guilty of negligence, they were to find for the plaintiff.

Verdict for the plaintiff.

1816.
March 6.

TODD AND OTHERS, EXECUTORS OF TODD v. RITCHIE.

(1 Starkie, 240.)

[240]

Improper treatment of the vessel by the captain will not constitute barratry, although it tend to the destruction of the vessel, unless it be shewn that he acted against his own judgment.

ASSUMPSIT on a policy of insurance; in one count of the declaration, the loss was alleged to have arisen from the barratry of the master.

After the vessel had left Quebec with her homeward cargo on board, she sprung a leak, and the captain put into Gaspie, in the gulph of St. Lawrence, and before any survey had taken place,

he broke up her ceiling and end bows with crow-bars, in consequence of which the ship was much injured and weakened, this it was suggested was done in order to procure the condemnation of the vessel.

TODD
v.
RITCHIE.

LORD ELLENBOROUGH :

In order to constitute barratry, which is a crime, the captain must be proved to have acted against his better judgment; as the case stands, there is a whole ocean between you and barratry.

The plaintiff afterwards elected to be nonsuited.

K. B. (AT NISI PRIUS) EASTER TERM.

JUDGE v. COX.†

(1 Starkie, 285—286.)

1816.
June 1

[285]

In an action for negligently keeping a dog, proof that the defendant had warned a person to beware of the dog lest he should be bitten, is evidence to go to a jury of the allegation that the dog was accustomed to bite mankind.

THIS was an action on the case for keeping a dog, which the defendant (as alleged in the declaration) knew to be accustomed to bite mankind, and which had severely bitten the plaintiff's leg.

It appeared, that the defendant, Mrs. Cox, had about six weeks before the accident happened, taken a ready furnished house at Harrow, and found the dog upon the premises, and that she was well aware of his savage disposition, and in consequence had warned one of the witnesses to take care of the dog lest he should be bitten. The dog had been attached to a tree by means of a chain and staple, but having by a sudden exertion broken loose, he inflicted the injury on account of which the action was brought. It also appeared, that subsequently to

† As parallel cases, see *Beck v. M. & R.* 496, 4 L. J. N. S. Ex. 362; *Dyson* (1815) 16 R. R. 774, 4 Camp. *Worth v. Gelling* (1866) L. R. 2 C. 198; *Thomas v. Morgan* (1835) 2 Cr. P. 1.—R. C.

JUDGE
v.
Cox.

this period the dog had bitten a child, but there was no evidence of any anterior biting.

The *Attorney-General* contended, that there was no evidence from which the jury could infer a knowledge on the part of the defendant that the dog had been accustomed to bite mankind, since there was no evidence that it had previously bitten any human being.

[*286]

ABBOTT, J. intimated, that had it not been for the expression proved to have been used by the *defendant in warning the witness to beware lest the dog should bite him, he should have directed a nonsuit. His Lordship afterwards said to the jury: In order to warrant a verdict for the plaintiff, you must be satisfied that the dog had before the time of this injury bitten some human being, and that the defendant knew it. It is not necessary now to consider whether such an action might not be sustained on a declaration charging the defendant with negligently keeping a dog of a savage and ferocious disposition, because in this case the declaration alleges that the dog was accustomed to bite mankind, and that the defendant knew it. If you are satisfied as to both of these points, your verdict ought to be for the plaintiff. I think sufficient caution has not been used, for whenever a person keeps a savage dog, he is bound so to secure it as effectually to prevent its doing mischief. After his Lordship had commented on the facts of the case, the

Jury found for the plaintiff. Damages, 55l.

SANDBACK *v.* THOMAS.†

(1 Starkie, 306—307.)

1816.
June 7.

In an action for maliciously holding the plaintiff to bail he is entitled in the calculation of damages to recover, not merely the taxed costs, but the costs as between attorney and client.

[306]

THIS was an action for maliciously holding the plaintiff to bail for the sum of 300*l.* and obliging him to find bail, by means of which he was put to great expense, &c.

The defendant, after the plaintiff had appeared, allowed himself to be nonsuited, and the costs of the present plaintiff had been taxed.

[307]

Parke, for the defendant, contended, that in the calculation of damages the plaintiff would not be entitled to claim for costs, as between attorney and client, but only for the amount of the taxed costs; and he cited the case of *Sinclair v. Eldred*, 4 Taunt. 7, where it had been decided, that in an action for a malicious prosecution, the defendant could not be charged with the plaintiff's extra costs.

LORD ELLENBOROUGH:

If, by your act you subject a party to a legal liability to pay a sum to another, you must indemnify him against such expenses; if it were otherwise, it would come to this, that an attorney would not maintain an action against his client for the extra costs.

Verdict for the plaintiff.

† This decision has been disapproved by the Court of Common Pleas in *Grace v. Morgan* (1836) 2 Bing. N. C. 534. But the principle

seems to be supported by the judgment of COLERIDGE, C. J. in *Bradlaugh v. Newdegate* (1883) 11 Q. B. D. 1, 52 L. J. Q. B. 454.—R. C.

1816.
June 10.

DOWNES v. BACK.†

(1 Starkie, 318.)

[318]

In an action for not replacing stock on a particular day, the plaintiff may estimate his damages according to the price of stock at the time of the trial.

THIS was an action on a bond conditioned for the replacing of stock on a particular day. It was alleged, by way of breach, that the defendant had not replaced the stock.

It appeared, that on the day specified for replacing the stock the value was 57*l.* and that on the day of trial it was 63*l.*, and Lord ELLENBOROUGH held that the plaintiff was entitled to claim according to the value upon the day of the trial.

1816.
June 10.

SHAW v. BRAN.‡

(1 Starkie, 319—322.)

[319]

A deed, by which a felon, on the eve of his trial for a capital offence, assigns his property to another, cannot be supported without proof of consideration.

THIS was an action of trover to recover the value of promissory notes, cash notes, and bank notes, to the amount of 115*l.* and upwards.

It appeared that a person of the name of Evans, whilst he was in confinement in Warwick gaol on a charge of felony, about a fortnight before the assizes had executed a deed of assignment of his property to the plaintiff. The deed recited, that Evans was indebted to Shaw, the plaintiff, who was a coal-dealer in Warwick, in the sum of 70*l.*, and also to another person of the name of Smith, in the sum of 17*l.*, and that Evans was entitled to certain property in the possession of Bran (the defendant), a peace officer, and to other property, specified in a schedule annexed to the deed. And by this deed Evans did bargain, sell, assign, and set over the property lately seized and taken possession of by Bran, and all other his property, whether in his own custody or

† Same principle applied in *Owen v. Ogle* (1854) 14 C. B. 327, 23 L. J. C. P. 105.—R. C.

‡ The principle of this case does not seem to be affected by the Act of 1870, 33 & 34 Vict. c. 23.—R. C.

SHAW
v.
BRAN.

in that of any other person whatsoever, mentioned in the schedule, in trust to sell such as did not consist of money, and to pay the costs of the assignment, &c. and to pay the debts due from Evans to Shaw and Smith.

It also appeared that Evans, who had also been known by the name of Bevan, had purchased a *horse from Shaw for the sum of 30*l.* in payment for which he had given his bill for 48*l.* Shaw had afterwards signified to Evans that he was dissatisfied with the bill; but it did not appear that the bill had been dishonoured. Evans had been capitally convicted at the ensuing assizes.

[*320]

The plaintiff having closed his case :

Gurney for the defendant, submitted, that under these circumstances, the plaintiff ought to be nonsuited; and he cited the case of *Jones v. Ashurst*, Skinner, 357. There the son brought an action of trover against the sheriff of London. The father who was afterwards executed for robbery and burglary, being in Newgate upon this charge, made a bill of sale of the goods, to the intent to make provision for his son, the plaintiff; and Holt, Ch. J. held, that the sale was fraudulent, for though a sale *bonâ fide*, and for a valuable consideration had been good, because the party had a property in the goods till conviction, and ought to be reasonably sustained out of them, yet such a conveyance as the present could not be intended to any other purpose than to prevent a forfeiture and defraud the King, and that it was a fraud at common law.

That was the case of a conveyance to a child, and if any consideration short of an actual debt could be good, the making provision for a child, *would be as much favoured as any. But the present case (he said) was much stronger; for although the transactions between the plaintiff and Evans were involved in some obscurity, yet as far as the evidence went, it tended to negative the recital of the deed, that a debt to the amount of 70*l.* was due to the plaintiff. There was no evidence to support the statement in the recital, that a debt was due, either to Shaw or to Smith, it was easy to make that statement, but there was no evidence whatsoever as to any debt to Smith; and the

[*321]

SHAW
v.
BRAN.

evidence which had been given, rather shewed a debt due from Shaw to Evans than the converse.

The *Attorney-General* for the plaintiff, relied on the deed whose execution had been proved, and which recited the debt due from Evans to Shaw, and also the debt from Evans to Smith, the last of which he was prepared to prove by other evidence; this, he contended was sufficient, as against the defendant, who did not pretend that he held the property under any title.

LORD ELLENBOROUGH:

[*322]

I am of opinion that this deed, executed as it was by the party on the eve of his trial for a capital offence, of which he was afterwards convicted, cannot be supported without proof of the consideration. If there had been a good consideration, the assignment would have been valid, although the object was to avoid a forfeiture. A transaction of this nature is to be regarded with a considerable degree of jealousy; I should have expected satisfactory proof of the *debt from Evans to Shaw. Some evidence has been given on the subject of the debt; it appears that Evans had purchased a horse from Shaw, and that he gave him a bill of exchange in payment, upon which some suspicion was cast, but it does not appear that it was ever dishonoured; with respect to the debt to Smith, such a debt is recited in the deed, but there is no proof of it. If nothing more had appeared as to the debt to Shaw than the recital in the deed, the case might have been attended with some difficulty, but that difficulty no longer exists, since the debt has been disproved by the evidence.

Proof was afterwards offered of the debt from Evans to Smith to the amount of 17*l.* which was objected to by

Gurney, the plaintiff having closed his case; and his Lordship was inclined to think that the fact would not make any difference, in a case which he was disposed to view with much jealousy.

Plaintiff nonsuited.

PEIRSE *v.* BOWLES AND SPIBEY.

(1 Starkie, 323.)

1816.
June 10.

[323]

After a tender of what is due from two persons on a joint contract, a subsequent application to one of them, is sufficient to support a replication to a plea of tender, that the plaintiff subsequently demanded payment from the defendants.

THIS was an action brought to recover for business done by the plaintiff as the attorney of the defendants, in surrendering the principals in two actions, in which the defendants were their bail.

Pleas, the general issue, and a tender of 6*l.* 10*s.* Replication, a subsequent demand by the plaintiff, and a refusal by the defendants to pay that sum.

The tender was proved, and it appeared that afterwards the plaintiff had made a demand of the money from one of the defendants only.

Storks for the defendants, contended, that it was incumbent on the plaintiff to prove a subsequent demand from both the defendants ;

But Lord ELLENBOROUGH held, that a refusal by one was equivalent to a refusal by both.

Verdict for the plaintiff.

WADESON *v.* SMITH.

(1 Starkie, 324—325.)

1816.
June 10.

[324]

Previous to the bringing an action on an attorney's bill, it is sufficient under the stat. 2 Geo. II. c. 23, s. 23,† to deliver a bill at the defendant's last known apparent place of abode at the time when the bill was delivered.

And it is not sufficient for the defendant to shew that he had another known place of abode, subsequent to the delivery of the bill.

THIS was an action of assumpsit upon an attorney's bill, and the principal question was, whether the plaintiff in delivering a

† See now 6 & 7 Vict. c. 73, s. 37, which is nearly in the same terms.—R. C.

WADESON
v.
SMITH.

copy of his bill, had complied with the prescriptions of the stat. 2 Geo. II. c. 23, s. 23,† which directs that the bill shall be delivered to the party charged therewith, or left for him at his dwelling-house or last place of abode.

It appeared that in May, 1812, the defendant took lodgings in Drury Lane, in which he resided till the July following, when he went (as the witness stated,) to a pastry-cook's in Lisle Street; letters and parcels for the defendant, had been sent to the lodgings in Drury Lane, for a short period after his quitting them, and the copy of the bill had been left there for him in October, 1812.

Storks for the defendant, objected that this was not sufficient, since by inquiry at the lodgings in Drury Lane, the plaintiff would have discovered that the defendant then resided in Lisle Street, which was a place of abode subsequent to that in Drury Lane, and consequently the bill had not been delivered at the last place of abode as was required by the statute.

[325]

LORD ELLENBOROUGH :

The bill was delivered at the last place of abode then known. The last apparent place of abode is to be taken as the last place of abode, and this as far as appears, was in Drury Lane, for *non liquet* that he had any settled place of abode in Lisle Street, he went thither but he might sleep elsewhere, and merely visit the place casually. You may if you can, shew that the defendant at the time of delivery, had a later known place of abode.

Storks said that he was prepared to shew a later place of residence, during the last two years.

LORD ELLENBOROUGH :

That will not be sufficient, the question is whether the bill was well delivered at the time of delivery.

Verdict for the plaintiff.

† See note on previous page.

K. B. (AT NISI PRIUS) TRINITY TERM.

CHIODI *v.* WATERS.

(1 Starkie, 335—336.)

1816.

July 4.

[335]

An agreement to employ the plaintiff in a particular situation cannot be inferred from a direction upon a letter addressed by the defendant to the plaintiff in that character, the letter itself relating to the quantum of salary only.

THIS was an action on an alleged agreement by the defendant to employ the plaintiff as primo buffo at the English Opera, at a salary of 400*l.*, in consideration that the plaintiff would come to this country from Amsterdam, to perform, &c.

It was contended by the plaintiff that the defendant, in breach of his agreement, instead of employing the plaintiff as primo buffo in the first characters, had called upon him to perform inferior ones, such as the Count in “Griselda,” &c.

In proof of the allegation that the plaintiff had been retained as primo buffo, he relied upon a letter from the defendant, directed to the plaintiff, “Signior† Chiodi, primo buffo, Amsterdam.”

In this letter the defendant regretted that it was not in his power to comply with the plaintiff’s request, but stated that he would engage to give him 400*l.* per annum, which, with other advantages, would amount to nearly as much as the plaintiff asked for.

LORD ELLENBOROUGH was of opinion, that since the letter itself related merely to the quantum of salary, the mere direction upon it was not sufficient *to constitute a special agreement such as was contended for.

[*336]

Plaintiff nonsuited.† *Sic.*

1816.
July 8.

DOE ON THE SEVERAL DEMISES OF THE BISHOP OF
LONDON, AND OF MARSHALL *v.* WRIGHT.

[349]

(1 Starkie, 349—351.)

A party who has enjoyed an encroachment upon a common for more than twenty years is not precluded from shewing such enjoyment when his title is disputed, by having subsequently accepted a conveyance of contiguous land in which the land in dispute is described as waste land.

THIS was an action of ejectment brought to recover the possession of seven poles of land in front of Marshall's house at Hornsea.

The land in question which adjoined the highway, was part of the manor of Hornsea, of which the Bishop of London was the lord, and Marshall claimed by virtue of an Inclosure Act, which authorized the commissioners to sell part of the wastes to be enclosed, in order to defray the expenses.

The commissioners acting under this authority had sold to Marshall the land in question.

The defendant relied on a clause in the Inclosure Act, (which is usually inserted in such Acts,) by which it was enacted, that no encroachments on the waste which had existed for 20 years before the passing of the Act, should be considered as part of the waste, and that no title derived by virtue of such encroachment should be disputed. And it was proposed to prove, that the land in question had for 40 years back been continually occupied by Wright, who was a carpenter, and those who had before him carried on the same business in the adjoining premises, by placing timber there, by putting up stakes upon it, and *by raising a small bank between the land and the road.

[*350]

The defendant proceeding to prove such occupation,

Topping for the plaintiff objected, that the evidence of such occupation previous to the year 1787 was inadmissible, inasmuch as in that year the defendant had accepted a conveyance of an adjoining piece of land by the homage which in setting out the abutments, described the land now in dispute as waste land. Having therefore adopted the description of the land as waste at

that time, he could not now contend that it was antecedently an encroachment from the waste.

DOE
v.
WRIGHT.

LORD ELLENBOROUGH:

Its leading description at that time was waste, and it was properly described as such. Afterwards the Act attached on the possession, and what was before waste, became by the operation of the Act of another quality. I think therefore that the whole of the evidence may be gone into.

The defendant having proved the occupation as above stated, Lord ELLENBOROUGH was of opinion, that since the land had been so long occupied by putting up stakes, depositing wood there, and by a kind of enclosure (the bank) from the road, the defendant was entitled to a verdict.

Verdict for the defendant.

HUME v. OLDACRE.

(1 Starkie, 351—352.)

1816.
July 8.

In an action of trespass against a huntsman for hunting over the lands of another, damages may be recovered, not only for the mischief immediately occasioned by the defendant himself, but also for that done by the concurrence of people who accompanied him.

[351]

THIS was an action of trespass, *quare clausum fregit*.

* * * * *

It appeared that the defendant was the huntsman to a society called the Berkeley Hunt, and that the defendant followed the hounds, accompanied by a concurrence of people, over the plaintiff's land.

[352]

Gurney, for the defendant, in his address to the jury, contended, that they were to estimate the damage according to the mischief which the defendant had individually occasioned by his trespass. But,

Lord ELLENBOROUGH interfered, stating his opinion, that the defendant, being a co-trespasser, was liable to answer for the whole of the damage.

Verdict for the plaintiff.

1816.
July 10.

[354]

REX v. CUTLER.†

(1 Starkie, 354—357.)

A patentee in the specification sums up the principle in which his invention consists; if this principle be not new the patent cannot be supported, although it appear that the application of the principle, as described in the specification, is new.†

THIS was a *scire facias*, brought to repeal letters patent which had been granted, for an invention claimed by the defendant.

The material question arising on the pleadings, was, whether the invention was new.

It appeared, from the defendant's specification, that the invention consisted in a new mode of feeding the fire in a grate, by a supply of fuel from below, instead of from above, in the usual way. The coals intended to be consumed in the course of the day, were to be deposited in a chamber beneath the grate, so placed, that at first the higher surface of the chamber was to be on a level with the lower surface of the grate. The fire being afterwards lighted in the grate, as the coals in the grate were gradually consumed, their place was to be supplied by winding up the coals from the chamber, by means of a rack and pinion. The coals, as long as they remained in the box, were unignited, the air being excluded *from below, and did not become ignited, until, by being wound up into the grate, they had been brought into contact with the coals previously ignited and exposed to the access of the air.

[*355]

The defendant, in his specification, had summed up the amount of his claim; stating, my invention consists in this, that the fuel necessary for supplying the fire, shall be introduced at the lower part of the grate, in a perpendicular, or in an oblique direction: as to the manner of performing it, it is set forth in the annexed descriptions and drawings.

In order to disprove the novelty of this invention, evidence was given that Mr. Marriott, a manufacturer of grates and stoves, had in the year 1812 made a model (which was produced) of a grate and its appendages, for cooking. The grate, which was of

† See also the report in 1 Web. P. C. 76, n. It seems that the principle would hold *à fortiori* in the case

of a patent under the Act of 1883. See s. 5 (5).—R. C.

REX
v.
CUTLER.

considerable length, was furnished with a door; when this door was open, the grate in no respect differed from an ordinary one, but when the door was shut, no part of the grate was visible except a few of the highest bars; and the whole of the grate having been filled with coals, and the coals within the bars above the door having been lighted, the coals in the lower part of the grate were carried up, for the purpose of supplying the consumption above by means of a rack and pinion, at the discretion of the cook. The principle of this grate, it was contended, was precisely the same with that for which the patent was claimed; the lower *part of the grate, when the door was shut, being in effect a closed chamber, to which the air had no access, and the coal being gradually wound up from this chamber so as to afford a supply to the fire above. Marriott stated that he had also applied the same principle to a common grate long before the date of the patent. Another manufacturer, of the name of Coombe, exhibited a grate for cooking nearly on the same construction. The grate was supplied with two doors, one above the other; when both were shut, the air was supplied by a ventilator from below; when the lower door was shut, and also the ventilator, and the higher door thrown open, the closed part of the grate supplied the place of a chamber, from which the coals were wound up by a rack and pinion, in order to supply the fire above as it was wanted for culinary purposes.

[*356]

It was contended for the defendant, that his invention went beyond that exhibited in these grates; in the latter there was no fresh introduction of fuel into the grate, so as to give a perpetual supply, there was nothing more than a means of contracting or compressing coals already within the grate, which could not be done without gradually diminishing the size of the grate itself. According to the defendant's construction, on the contrary, the chamber was independent of the grate, placed below it, and the fuel was gradually wound up from the chamber without at all contracting the size of the grate itself. It was also contended, that there were *some minor advantages which the patent grate possessed over those which had been exhibited in evidence.

[*357]

REX
v.
CUTLER.

Lord ELLENBOROUGH was of opinion that the principle on which the two grates were constructed was identical with that described in the terms of the specification, which was for a mode of supplying fuel from below, and there was nothing predicated in the specification of raising the fuel from below the grate; it was merely for elevating a supply of fuel from below, and that the defendant had confined himself by thus summing up the extent of his invention, to the benefit of this principle.

Verdict for the Crown.

1816.
July 11.

GUTHRIE AND ANOTHER v. WOOD.

(1 Starkie, 367—370.)

[367]

Goods seized and sold by the landlord under a distress for rent without any collusion, and purchased by a trustee of the tenant's estate under an assignment by such tenant, for the benefit of the creditors, out of the trust funds, are not liable to be taken in execution by an annuity and judgment creditor, although they are permitted by the trustees to remain in the possession of the tenant.

THIS was an action of trover, brought to recover the value of a number of presses and other articles, under the following circumstances.

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Eastman, who was a packer, was the proprietor of the goods in question, and he made an assignment of them to Wood, the defendant, as the trustee for Hewitt, in order to secure the payment of an annuity sold by Eastman to the latter. Eastman afterwards assigned his counting-house, fixtures, and utensils in trade, to Guthrie (one of the plaintiffs) and others, for the benefit of his creditors, subject to the annuity to Hewitt. Eastman was permitted to remain in possession of the goods, and whilst he continued in possession, Pearson, the landlord of the premises, sent in a distress for rent, and the goods in question were sold under the distress, and purchased by Guthrie, who paid for them (as was contended on the part of the defendant) out of the funds which he held in his hands, for the benefit of the creditors, and charged the amount of the purchase to them. Eastman still remained in possession of the goods, and they were seized under an execution, at the suit of Wood, as the trustee of Hewitt.

For the defendant, it was contended, that the plaintiffs could not, by purchasing the goods out of the creditor's funds, defeat the annuity; that the whole transaction was a mere shuffle, to effect this object, Guthrie having declared that, having got rid of the annuity, he would let the goods remain on the premises; and that the goods being allowed to remain in the possession and visible ownership of Eastman, were liable to the execution sent in by the defendant: and the case of *Lingham v. Biggs*, 1 Bos. & P. 82, was cited in confirmation of this position.

GUTHRIE
WOOD.

[*369]

On the other side, the cases of *Kidd v. Rawlinson*, 3 Esp. 52, 2 Bos. & P. 59,† and *Leonard v. Baker*, 1 M. & S. 251, were cited, to shew, that the circumstance of Eastman's being allowed to remain in possession, did not render the goods liable to the execution.

LORD ELLENBOROUGH :

I had supposed that evidence would have been given of some collusion on the part of Pearson, the landlord, with the plaintiff; but nothing of this kind appears. The plaintiffs acquired a property in the goods by purchasing them at the sale under the distress. Guthrie, as a trustee, was not on that account precluded from becoming a purchaser; he purchased them as any other person might have done; and though he had taken the money with which he purchased them from the strong box of another, that would not have vitiated the sale. His motive for buying was, that the goods might not be removed from the premises, but might remain there for the benefit of the creditors, and he was quite at liberty if he chose to leave Eastman in the possession. The doctrine of possession applies to cases of conveyance from the party himself. The statute of Eliz. does not apply to a case like this, where the property is sold not by the party, but under a distress for rent. I had supposed that an attempt would have been made to shew that the *distress was merely colourable and fraudulent, and that the landlord had been induced to act merely in favour of Eastman or the creditors; but this does not appear. Guthrie became the

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GUTHRIE
v.
WOOD. purchaser at the sale as any other person might have been, and it was at his option to take the goods or leave them; he was the legal proprietor, and Wood had no right to take them in execution.

Verdict for the plaintiffs.

1816.

BREMBRIDGE v. OSBORNE.

(1 Starkie, 374—375.)

[374]

Where there is a competition of evidence upon the question whether a security has been satisfied by payment, the possession of that security by the claimant ought to turn the scale.

THIS was an action by the indorsee against one of the makers of a joint and several promissory note, for the sum of 102*l.* and a fraction, payable seven months after the date.

The defendant had paid 6*l.* into Court, and the defence was, that the remainder had been paid to Thorowgood, the payee.

[*375]

In summing up to the jury, his Lordship observed, that where there is a competition of evidence on the question, whether a security has or has not been satisfied by payment, the possession of *the uncanceled security by the claimant ought to turn the scale in his favour, since in the ordinary course of dealing, the security is given up to the party who pays it.

Verdict for the defendant.

1816.

WRIGHTSON AND ANOTHER v. PULLAN AND ANOTHER.

(1 Starkie, 375—376; S. C. *nom.* Wright v. Pulham, 2 Chitty, 121.)†

[375]

After the actual dissolution of a partnership between A. and B., A. accepts a bill in the name of the partnership, bearing date before the dissolution. An indorsee who takes the bill without notice of the dissolution cannot enforce the bill against B.

THIS was an action by the plaintiffs, as the indorsees, against the defendants, as the acceptors of a bill of exchange, dated Feb. 1st, 1815, for the payment of 850*l.*

† As to the point of notice of dissolution in the Gazette, which is mentioned in the report in Chitty, but not quite accurately, see the Partnership Act, 1890, s. 36 (2).—F. P.

It appeared that the bill was drawn by Taylor & Son, payable to their own order, and accepted by Hopercroft, one of the defendants, in the name of himself and his partner, and indorsed by Taylor & Co. to the plaintiffs for value. The defence was, that after the date of the bill, but before it had actually been drawn, the partnership between Pullan and Hopercroft had been dissolved. The dissolution took place on the 13th of Feb. 1815, and had been published in the *Gazette* on the 14th of Feb. and after this the bill had been delivered *to the plaintiffs, with Hopercroft's acceptance upon it.

WRIGHTSON
v.
PULLAN.

[*376]

Topping for the plaintiffs contended, that they were entitled to recover, since they had taken the bill dated before the dissolution for value, and without any notice of the dissolution. But

Lord ELLENBOROUGH was of opinion that since the partnership had actually been dissolved before the drawing of the bill, Pullan could not be charged by the subsequent act of Hopercroft.

Verdict for the defendant.

In the ensuing Term, *Topping* moved for a new trial, but the rule was refused, and a distinction was taken between the present case and the case of goods supplied after a dissolution of partnership, but without notice, by one who has been in the habit of supplying goods to a firm.

BLUETT v. OSBORNE AND ANOTHER.†

(1 Starkie, 384—385.)

1816.

[384]

A. sells and delivers to B., without a price being specified, a bowsprit which at the time of sale appears to be perfectly sound, but which, after being used some time, turns out to be rotten: in the absence of fraud, A. is entitled to recover from B. what the bowsprit was apparently worth at the time of delivery.

THIS was an action of assumpsit, for goods sold and delivered.

The question was as to the price of a bowsprit supplied by the

† See *Gardiner v. Gray*, 16 R. B. 764 and note, 4 Camp. 144; and contrast the case of a purchase from the manufacturer, as in *Randall v. Newson* (1877) 2 Q. B. Div. 102, 46 L. J. Q. B. 259.—R. C.

BLUETT
v.
OSBORNE

plaintiff to the defendants. No specific price had been stipulated for ; the vessel sailed, and upon her arrival at Madeira, the bowsprit, upon being cut up, was found to be rotten. The defendants had had an opportunity of inspecting the bowsprit, which appeared, at the time of delivery, to be in every respect good and perfect.

It was contended for the defendants, that they were not liable to more than the real value of the bowsprit ; and the case of *Farnsworth v. Garrard*, 1 Camp, 38,† was referred to. And that there was an implied warranty on the part of the vendor, that the article should be made of good and sufficient materials.

LORD ELLENBOROUGH :

[*385] A person who sells, impliedly warrants, that the thing sold shall answer the purpose for which it is sold ; in this case the bowsprit was apparently good, and the defendants had an opportunity of inspecting it. No fraud is complained of, but the bowsprit turned out, to be *defective upon cutting it up. I think the plaintiff is not liable on account of the subsequent failure. In the case cited, what the plaintiff deserved, was the value of the building ; what he deserves here, is the apparent value of the article at the time of delivery : Supposing the price to have been paid on delivery, could it have been recovered back ?

Verdict for the plaintiff, damages 60l.

In the ensuing Term the Court refused a rule *nisi* for a new trial.

1816.

MORELAND v. LEIGH AND ANOTHER.

(1 Starkie, 388—389.)

[388]

An action on the case does not lie against a sheriff (who has not been ruled to return the writ) for neglecting to have the money in Court according to the exigency of a *feri facias*.

THIS was an action against the defendants, as sheriffs of London.

[389]

The declaration stated, that the plaintiff had recovered a debt

† 10 R. R. 624.

against A. B. and sued out a *fi. fa.* which was delivered to defendants, the sheriffs, to be executed; the first count averred, that the defendants forbore to levy when they might have levied, and had not the money, &c.; the second averred, that the defendants had levied, but had not the money, &c.

MORELAND
v.
LEIGH.

Lord ELLENBOROUGH was of opinion, that this was not such a default as laid the foundation of an action. The sheriffs should have been ruled to return the writ, which the Court would have required to be a legal return, and if false, the plaintiff then would have been entitled to his action.

Plaintiff nonsuited.†

† I am indebted to a friend for his note of the above case.

Regularly an action on the case does not lie against the sheriff for not returning a writ without other default, for he shall be amerced. Semb. 2 Inst. 452, and Com. Dig. Return. F. 1. But it is otherwise where the plaintiff delivers his writ to the sheriff in full county, according to the provisions of the stat. West. 2, 13 Ed. I. c. 39.† 2 Inst. 452, and see the stat. 20 Geo. II. c. 37.†

A sheriff having returned to a writ of *fi. fa.* that he has seized and sold part, and that the residue remains in his hands for want of buyers may shew, upon an action brought for not having the money in court, &c. that the goods were in fact the property of the assignees of the defendant who had become a bankrupt.

BRYDGES AND ANOTHER v. WALFORD.

THIS was an action against the sheriff of Essex, tried at the Essex Summer Assizes, 1816.

The declaration alleged, that the plaintiffs' having obtained judgment against William Collen for a debt *of 3,000*l.*, sued out a *fi. fa.*, &c. whereupon the defendant returned

that he had levied on goods to the amount which remained in his hands for want of buyers, whereupon the plaintiffs sued out a *venditioni exponas*, upon which the defendant returned, that he had sold goods to the amount of 1,000*l.*, but that the residue remained in his hands for want of buyers. The declaration then alleged, that the defendant had not the money so levied before our said Lord the King at Westminster, &c.; but that contrary to his duty as such sheriff he had paid the sum so levied, and delivered the goods so seized to divers persons unknown.

The plaintiffs were judgment creditors of Collen's, upon a judgment signed Oct. 4, 1815. On the 10th of October a *fi. fa.* was delivered to the sheriff, who seized goods to the amount. On the 20th of November the sheriff returned, that he had levied, and that the goods remained in his hands for want of buyers. On the 23rd of November the plaintiffs sued out a writ of *venditioni exponas*. In Hilary Term, 1816, the sheriff returned, that he had sold part, and that the residue remained in his hands for want of buyers. A commission of bankruptcy was sued out against Collen, Feb. 1816. It was

[*390, n.]

† Repealed, 50 & 51 Vict. c. 55, s. 39.

K. B. (AT NISI PRIUS) MICHAELMAS TERM.

1816.
Nov. 29.

[408]

ALDERSON AND ANOTHER v. CLAY.

(1 Starkie, 405—407.)

In an action against one of several members of a society established under a deed of co-partnership for goods supplied to the society, the defendant may be proved to be a partner by parol evidence without producing the deed. And the entries in a book containing a record of the proceedings of the society produced at the meetings, and open to the inspection of all the members, are admissible in evidence against the defendant after he has been proved to be a member of the society.

THIS was an action of assumpsit for goods sold and delivered.

The plaintiffs were manufacturers of leaden pipes, and the action was brought against Clay, the defendant, as a member of a society of persons, associated under the name of the Gosport and Forton Water Works Company, for the value of leaden pipes supplied to them to the amount of 487*l.* 10*s.*

The plaintiffs proved by oral evidence, that a company

contended on the part of the plaintiffs, that the defendant was precluded by his return from adducing evidence to shew that the goods were the property of Collen's assignees. That it was the duty of the sheriff to sell the goods, and that he could not, after returning that he had sold them, pay over the product to the assignees. On the part of the defendant the above case was cited.

BURROUGH, J. admitted evidence to shew that the plaintiffs knew that Collen (who had committed an act of bankruptcy at the time of the execution) was insolvent. The defendant had a verdict with leave to the plaintiffs to move to enter a verdict.

A rule *nisi* having been obtained to that effect, *Gurney and V. Lawes* contended, that the sheriff's return

was conclusive upon him. It had been held, that the acts of the sheriff were binding on third persons *a fortiori*, they were conclusive against himself; and that the proper course for the sheriff was to apply to the Court to permit him to amend his return.

LORD ELLENBOROUGH :

The sheriff is not supposed to be omniscient, he did what was right at the time, but when he found that he was not justified in what he had done, he was not to proceed to all lengths. If you had received the money from the sheriff, you must have repaid it to the assignees. The claim is against both law and morals.

The other Judges being of the same opinion,

The rule was discharged.

existed under the denomination of the *Gosport and Forton Water Works Company, and that the defendant was a member of the society, and that Nicholson, who was also a member of the society, had given orders by a letter (which was produced and read) to the plaintiffs, to send the leaden pipes in question on account of the company. It was also proved that the defendant, Clay, had attended several meetings of the society, and had acted as chairman, and that the course was for the clerk of the society to take minutes of the proceedings which took place at each meeting, and afterwards to enter them in a book, which was submitted to the inspection of the society at the next meeting, when it was laid open on the table, and was accessible to all who attended the meeting. It appeared that the minutes had usually been taken by Sloper, the clerk to the society, and had been entered in the book by his clerk, (who was called as a witness), from time to time. It appeared also, that there was a deed of co-partnership, which was in the hands of Fisher, the present clerk; but this deed was not produced.

ALDERSON
C.
CLAY.
[*406]

It was proposed to read entries contained in the book, in order to shew that the order given by Nicholson had been authorized by the society, and consequently to establish the liability of the defendant (who had not pleaded in abatement) in the present action.

Scarlett for the defendant, objected, that in order to establish the fact of the defendant's being a *member of the society, the deed of co-partnership, which was in the hands of Fisher, ought to have been produced, and that no entry in the book could be read against the defendant, without proof that he had authorized it; and that he could not be bound by entries copied by a clerk in Sloper's office, without shewing some authority by him to make such entries, or some recognition of them after they had been made.

[*407]

LORD ELLENBOROUGH :

It has been proved that the defendant was present at three meetings, and a witness has stated that he is a proprietor; this evidence makes him privy to the acts of the society to which he

ALDERSON
v.
CLAY. belongs; and his partnership having been once established, a book containing the records of the society, and which it appears was open to the inspection of every member, is evidence against him.

Several entries from the book were then read, from which it fully appeared that the order by Nicholson had been authorized by the society.

Verdict for the plaintiffs.

1816
Nov. 30.

At Guildhall.
[408]

HARTLEY v. HITCHCOCK.

(1 Starkie, 408—409.)

A. having repaired a carriage for B., allows him to take it away from time to time; he cannot afterwards detain it for the amount of the repairs: neither can he detain it upon a claim for standage, without an express contract to pay for standage, or unless the owner leaves it upon the premises beyond a reasonable time after notice.

THIS was an action of trover, brought to recover the value of a tilbury.

The defendant was a coach-maker, and the plaintiff had sent his tilbury to him to be repaired. After the repairs had been completed, the tilbury remained, by the permission of the defendant, in his yard, and the plaintiff had frequently taken it out of the yard and returned it. At the expiration of two months the defendant, on the 12th of October, refused to permit the plaintiff to take away the tilbury, unless he paid for the standage for two months, at the rate of two shillings per week, and also the amount of the repairs, for which, it was stated, the plaintiff had given a bill of exchange, which would be due on the 23rd of October. The plaintiff tendered him one shilling and sixpence per week for the standage.

[*409] *Storks* for the defendant, contended that he had a right to detain the tilbury for the repairs, and *also for the standage at the rate of two shillings per week, supposing that sum to be no more than a reasonable compensation.

LORD ELLENBOROUGH :

HARTLEY
v.
HITCHCOCK.

The defendant, after the repairs were completed, relinquished his possession, and could not afterwards detain for the amount of the repairs. With respect to standage, there can be no legal claim for it, without an express contract between the parties, or unless the owner has left his property on the premises beyond a reasonable time, and after notice has been given to him to remove it.

Verdict for the plaintiff.

DOE ON THE DEMISE OF TAYLOR v. JOHNSON.

1816.
Dec. 2.

(1 Starkie, 411—412.)

[411]

A lease contains a proviso for re-entry, in case the rent shall be twenty-one days in arrear, and there shall be no sufficient distress on the premises; the landlord, who distrains before the expiration of the twenty-one days, but continues in possession of the distress upon the premises until after the expiration of twenty-one days, does not thereby waive his right of re-entry.

THIS was an action of ejectment brought on a clause of proviso for re-entry, in case the rent should be twenty-one days in arrear, and there should be no sufficient distress on the premises. A distress was made on the 16th of October, and the landlord (the lessor of the plaintiff) continued in possession until the 21st of October; the forfeiture for non-payment accrued on the 20th of October, and the demise in the declaration was laid on the 28th.

V. Lawes for the defendant contended, that the lessor of the plaintiff, by continuing in possession of *the goods after the 20th, had thereby acknowledged an existing tenancy, and waived the forfeiture.

[*412]

Campbell for the plaintiff contended, that since there was no sufficient distress on the premises, the breach in nonpayment of rent was a continuing one up to the 28th of October, the day of the demise, and that, consequently, the right to re-enter remained entire up to that time.

DON
v.
JOHNSON.

LORD ELLENBOROUGH :

The only question is, whether by the act of distraining and continuing in possession the forfeiture was waived.† A right which had accrued at the time of the distress might have been waived by it, but the party is not estopped by it as to any right which accrued subsequently.

Verdict for the lessor of the plaintiff.

1816.
Dec. 3.

JENKINS AND ANOTHER v. BLIZARD AND ANOTHER.

(1 Starkie, 418—421.)

418]

A written notice of the dissolution of a partnership reciting the dissolution, and signed by the parties in order to its insertion in the *Gazette*, may be read in evidence to prove notice of the dissolution, although it has not been stamped.

Proof of the insertion of such notice, although but once in a newspaper taken in by the party sought to be affected by the notice, and left at his house in the usual course, is evidence to be left to a jury, without strict proof that the paper ever reached the party. But the most usual and prudent course in such cases is to give notice by a circular letter.

THIS was an action by the plaintiffs, who were warehousemen, against the defendants, Richard Blizard and Alexander Blizard, on a bill of exchange, dated August the 20th, 1816, drawn by the plaintiffs on the defendants for the sum of 45*l.* 4*s.* 8*d.* payable two months after date, and accepted by Richard Blizard.

The bill had been drawn on account of goods alleged to have been supplied by the plaintiffs to the defendants, as partners ; and the defence was, that previous to the supply of these goods, viz. on the 26th of December, 1815, the partnership which had previously existed between Richard Blizard and Alexander Blizard, had been regularly dissolved.

† See *Zouch* on the demise of *Ward v. Willingale*, 2 R. R. 770 (1 H. Bl. 311), where it was held, that a distress taken for rent accrued subsequently to the expiration of the notice to quit, was a waiver of the notice : but (*semble*) if the distress had been for rent which accrued

previous to the time of quitting according to the notice, the notice would not have been waived, *per* WILSON, J. 1 H. Bl. 312 (2 R. R. 772). See *Doe v. Batten*, Cowp. 243 ; *Goodright v. Cordwint*, 6 T. R. 219 (3 R. R. 161), and 8 T. R. 161, n.

On the part of the plaintiffs it appeared, that the pass-book, in which the goods to be supplied by them to the defendants had been entered by the plaintiff's clerk, had been sent as usual when the goods, for which the present bill was drawn, had been supplied; and that no alteration had been made in the title of the book, which purported to belong to Blizard & Co. It also appeared that *the words Blizard & Co. still remained as before in front of the defendant's shop.

JENKINS
v.
BLIZZARD.

[*419]

In order to affect the plaintiffs with notice of the dissolution of partnership, the defendants first proposed to read the following written notice, signed by the defendants, which had afterwards been inserted in the *Gazette*.

“December 26, 1815.

“Take notice, that the partnership between us hath, on and from this day, been dissolved by mutual consent, Alexander Blizard having retired therefrom.

“Witness our hands, { RICHARD BLIZZARD,
ALEXANDER BLIZZARD.”

Topping for the plaintiffs, objected that this notice contained in effect an agreement to dissolve the partnership, and therefore that it could not be read in evidence without having been first stamped with an agreement stamp. And he referred to the case of *May v. Smith*, 1 Esp. 288, where Lord KENYON was said to have held, that the instructions for advertising a dissolution of partnership in the *Gazette* could not be read to prove the dissolution, without an agreement stamp. But

Lord ELLENBOROUGH held, that in this case a stamp was unnecessary, since the instrument did not purport to be an agreement for the dissolution of partnership, but a mere recital that the partnership had already been dissolved.

The notice in the *Gazette* was then read.

[420]

The defendants proved that a similar advertisement had been inserted once in the *Morning Chronicle* of the 27th of December, and also that the plaintiffs took in the latter paper,

JENKINS
v.
BLIZARD.

which the newsman stated to have been delivered in the usual course to some person at the house of the plaintiffs.

Topping objected that this evidence did not entitle the defendants to have this advertisement read; the notice had been advertised in the *Morning Chronicle* once only, and it did not appear that this individual paper had ever reached the plaintiffs.

Lord ELLENBOROUGH was of opinion that it was admissible, and referred to the case where a party was sought to be affected with notice of an advertisement contained in a weekly provincial paper; in that case the paper was not only delivered at the house, but the party was seen to read it. His Lordship added, that he should leave it to the jury to say whether the attention of a tradesman, in reading a newspaper, was not likely to be attracted by notices of the dissolution of partnerships, to which the attention of others might not be directed. His Lordship afterwards left it to the jury to say, whether under all the circumstances of the case, the plaintiffs had actually received notice of the dissolution, observing, that in

[*421]

such cases the usual and most *prudent course was to send circular letters to all with whom the parties had dealings.

Verdict for the plaintiffs.

KING v. FORD.

(1 Starkie, 421—423.)

1816.
Dec. 4.

[421]

A schoolmaster who permits an infant pupil under his care to make use of fire-works is responsible in an action for the mischief which ensues. (*Dictum*, per Lord ELLENBOROUGH.)

But if the declaration allege that the defendant (in such an action) delivered the fire-works to the pupil, and caused and procured them to be delivered to him, and it turn out that although the defendant had permitted the use of fire-works by his pupils, the fire-works from which mischief resulted had in fact been delivered to the pupil by another person without the authority or knowledge of the defendant, the variance will be fatal.

THIS was an action on a special assumpsit, brought by the plaintiff against the defendant (who kept a school at Brixworth), for having, contrary to his duty and undertaking, delivered, and caused to be delivered, to an infant son of the plaintiffs, certain fire-works, and for having suffered him to retain the same, by the explosion of which the plaintiff's son was much wounded and

injured, and whereby the plaintiff was put to great expense about his cure, &c.

KING
v.
FORD.

The declaration contained three special counts, in each of which it was alleged, that the defendant had delivered, and caused and procured to be delivered, certain fire-works to the plaintiff's infant son, and had suffered and permitted him to retain the same in his possession.

It appeared that on the 4th of November, 1814, the defendant had promoted a subscription amongst his scholars, of whom the plaintiff's son was one, for the purchase of fire-works to be used on the evening of the next day, the 5th of November. The plaintiff's son was not a subscriber, and on the day following the fire-works were distributed amongst the subscribers. The defendant had invited several persons to his house to see the display, and amongst others a Mr. Phillips, who seeing that the plaintiff's son had not been supplied with any fire-works, gave him a dozen squibs, which he deposited in his breeches pocket. Soon after this, a school-fellow came behind him and wilfully set fire to the whole dozen, the explosion of which lacerated his thigh, and injured him so seriously, that he remained under a surgeon's hands for eleven weeks afterwards.

[422]

Lord ELLENBOROUGH, upon this evidence, was of opinion, that since the declaration, in every count, charged the defendant with having actually delivered the fire-works, or caused them to be delivered to the plaintiff's son, it was incumbent upon the plaintiff to prove an actual delivery by the defendant, or at least to show that the fire-works had been delivered by the defendant's authority. His Lordship intimated, that under another form the action would have been maintainable; and regretted that the difficulty arising from the present form of the declaration, could not be surmounted, particularly since so many calamitous, and even fatal accidents *had lately occurred from allowing such practices at public schools. His Lordship thought it proper to state his opinion, that if a master of a school, knowing that fire-works would be used, were to be guilty of negligence in not preventing the use of them, he would be amenable for the consequences.

[*423]

Plaintiff nonsuited.



1816.

Dec. 7.

At West-
minster.

[423]

MAYHEW, GENT. v. BOYCE.†

(1 Starkie, 423—426.)

The driver of a carriage upon a public road is not entitled to adopt an obviously hazardous course merely because in so doing he keeps to his own side of the road.

THIS was an action on the case, which was brought by the plaintiff, to recover a compensation in damages for an injury occasioned by the negligence of the defendant's agent.

[424] The plaintiff was a passenger by a public coach, called the "Phoenix," from London to Brighton, and the defendant was one of the owners of another public coach, from London to Brighton, called the "Dart."

It appeared that the "Phoenix" being before the "Dart," in the night-time, the driver of the latter attempted to pass the "Phoenix" at the top of a hill, and just as the latter was about to turn an angle in the road to the left. Many witnesses were called on the part of the plaintiff, to shew, that in consequence of the negligence of the driver of the "Dart" whilst making this attempt, the "Phoenix" was overturned by a violent impulse from the "Dart," and that the plaintiff, who was an outside passenger, had sustained serious injury, in consequence of his fall.

The case attempted to be established on the part of the defendant was, that at the time when the driver of the "Dart" attempted to pass the "Phoenix," the road was twenty-seven feet wide, and the "Phoenix" being about three feet from the left-hand side of the road, there was a space of seventeen feet wide to the right of the "Phoenix," which was amply sufficient to have allowed of the safe passage of the "Dart," without injury to the "Phoenix;" and that no accident could have happened, if the leading horses of the "Phoenix" had not, whilst the "Dart" was in the act of passing, been driven in an oblique direction from the left to the right side of the road. It was

† The case where a man is driven by another's negligence to a sudden choice between more or less dangerous actions must be carefully dis-

tinguished: *The Tasmania* (1890) 15 App. Ca. 223, 226; *Briggs v. Union Street Ry.* (1888) 148 Mass. 72, 76; *Jones v. Boyce*, p. 812 below.—F. P.

therefore contended, that since the accident happened in consequence of the "Phoenix" having *been driven in an oblique direction from the left side, which ought to have been kept, towards the right, the accident was not to be attributed to the conduct of the driver of the "Dart," and that the action therefore was not maintainable. It appeared, however, that the situation of the "Phoenix" had been seen for some time before the "Dart" came up, and that the driver of the "Dart" might, by driving nearer to the right side than he did, have effectually guarded against the mischief.

MATHEW

v.
BOYCE.

[*425]

LORD ELLENBOROUGH :

This is decisive of the case; if it be practicable to pursue a course which is safe, and you follow so closely upon the track of another that mischief may ensue, you are bound to adopt the safe course. This is the principle which is always acted upon in cases of injuries done to ships at sea. In point of law, it would make no difference whether the horses of the "Phoenix" swerved from their course at the instant when the "Dart" was passing, or they were directed by their driver; he had a right so to direct them, unless he knew that the "Dart" was following so closely behind. The circumstance of the "Phoenix" being on the wrong side of the road, on which the "Dart" had a right to pass, would not authorize the exercise of that right to the extent of destruction. The "Phoenix" at that time had the whole free range of the road, and the driver had a right to occupy any part of it, unless he was aware of the proximity of the "Dart." In the night-time there is always risk, and when one coach follows close upon the track of another, and there *are two ways, one of which is perilous and the other safe, the driver is bound to adopt that which is safe. The "Phoenix" being three feet from the left side, the driver thought it safer to take more room, and he had a right to do so, and the driver of the "Dart" ought to have calculated upon his exercise of that right.

[*426]

Verdict for the plaintiff. Damages 200l.

1816.
Dec. 7.

JAMES AND CHAPMAN v. SHORE.

(1 Starkie, 426—430.)

[426] Where different lots are sold at an auction for different sums, the contracts are separate, both in law and fact.

THIS was an action of special assumpsit.

[*427] The plaintiffs were commissioners appointed under an Inclosure Act, which authorized them to sell by public auction part of the enclosed lands, in order to defray the expenses of the inclosure. Several lots of land were accordingly put up to public sale by auction. By the printed conditions of sale, a deposit was to be made by the purchaser, and the whole of the purchase-money was to be *paid within a limited time afterwards; and they also contained a stipulation, that in case the purchaser made default, the commissioners should be at liberty to re-sell, and to charge the original purchaser with the difference between the original price and that of the re-sale.

The defendant at the sale was the highest bidder for lot 9, at 530*l.*, and for lot 10, at 550*l.*; and his name had been entered by the auctioneer as the purchaser of these two lots upon the printed particulars of sale.

By the Inclosure Act above alluded to it was directed, that the property to be sold by the commissioners should vest in the purchaser, by virtue of a receipt to be signed by the commissioners on payment of the purchase money: such a receipt had been tendered in due time to the defendant by the commissioners; but he had refused to pay the amount, alleging that he had acted as trustee only for a person of the name of Morgan. The commissioners had in consequence proceeded to a re-sale, and claimed the sum of 591*l.* as the loss on the re-sale, together with the auction duty.

The articles of sale had been stamped, on payment of a penalty of 10*l.* with an agreement stamp.

[*428] The special counts of the declaration alleged, (*inter alia*) that divers lots had been put up to *public sale, and that the defendant had then and there become the purchaser of divers, to wit, two lots, numbers 9 and 10, for divers sums of money, amounting to a large sum of money, to wit, the sum of 1080*l.*

They then proceeded to allege mutual promises to fulfil the special conditions of sale, and stated, by way of breach, the defendant's default in neglecting and refusing to pay the deposit or purchase money.

JAMES and
CHAPMAN
v.
SHORE.

The declaration also contained a general count in *indebitatus assumpsit*, for estates bargained and sold.

The *Attorney-General* and *Richardson* for the defendant objected, 1st, that the contract was not binding on the defendant, without a written instrument; and that the auctioneer could not, in this case, be considered to be the joint agent of both parties, but as the agent of the plaintiffs only, and, consequently, that he could not bind the defendant by signing his name to the articles of sale.

2ndly, That, supposing the case to be sufficiently taken out of the Statute of Frauds; yet that the contract was not sufficiently stamped, since not fewer than twelve lots were specified on the conditions of sale, the agreements in respect of the purchase of which were separate, and required separate stamps; and that it appeared, in fact, *that the stamp which appeared on the conditions had been applied to a different contract, since the stamp had been placed on a clause in the conditions by which it was stipulated, that F. Sherburn was to bid for the plaintiffs, and that if any lots should be knocked down to him, he was to be considered as a purchaser for the plaintiffs.

[*429]

3rdly, That the declaration was defective, since it stated a contract for the purchase of two lots, and supposed that they were both purchased under the same contract, whereas in fact, there was no joint contract for two lots, but two separate contracts, one for each lot, which was complete at the close of each bidding.

For the plaintiffs it was contended, that they were at liberty to apply the stamp to which contract they chose, and that the placing of the stamp was merely accidental, it being optional in the officer at the stamp office to impress it upon whatever part of the paper he chose; and they cited the case of *Powell v. Edmunds*, 12 East, 6.† With respect to the variance, it was

† 11 R. R. 316.

JAMES and
CHAPMAN
v.
SHORE.

urged that the joint promise resulted from operation of law, and that it would be productive of great inconvenience if a plaintiff were not to be permitted to allege a purchase in the aggregate in such cases, and that at all events the plaintiffs were entitled to recover on the general count.—But

[430]

Lord ELLENBOROUGH held the variance to be fatal, since the declaration stated the purchases as one contract, and in point of both law and fact the agreements were separate. With respect to the inconvenience which had been suggested, his Lordship said, that he was quite of a different opinion; and that much greater inconvenience would result from permitting the consolidation of contracts. With respect to the general count, the commissioners were authorized by the act to re-sell, and having re-sold these lots they could not be considered as sold to the defendant.

Plaintiffs nonsuited.

1816.
Dec. 7.

DOE ON THE DEMISE OF DELEGAL AND OTHERS v.
HOLLOWAY.†

[431]

(1 Starkie, 431—434.)

An estate is settled to the use of such person, &c. as J. B. shall by any writing, &c. signed, sealed, and delivered by him, in the presence of two or more witnesses, direct, limit, and appoint. J. B. may execute this power by his will, signed, sealed, and delivered in the presence of three witnesses.

THIS was an action of ejectment brought to recover possession of a freehold estate at Forty Hill, in the county of Middlesex, in consequence of the nonpayment of the arrears of an annuity charged on the estate, and due to Delegal, one of the lessors of the plaintiff, from Sarah Branscomb, the grantor, who was tenant for life of the premises under the will of Sir J. Branscomb, her late husband.

The defendant claimed under an assignment by the assignees under a commission of bankrupt against Sarah Branscomb.

† See *Vincent v. Bishop of Sodor and Man* (1850) 5 Ex. 683, 19 L. J. Ex. 366; *Smith v. Adkins* (1872) L. R. 14 Eq. 402, 41 L. J. Ch. 623. The principle is within the proviso of 22 & 23 Vict. c. 35, s. 12.—R. C.

It appeared that the estate had been settled to the use of such person or persons as Sir J. Branscomb, by any writing, &c., signed, sealed and delivered by him, in the presence of two or more witnesses, should direct, limit and appoint. Sir J. Branscomb had by his will, attested by three witnesses, devised and bequeathed the estate in question to his wife for life. One of the attesting witnesses stated, that the will was read over to Sir J. Branscomb, who signed it, and placing his hand on the wax for the purpose of acknowledging his seal, delivered it out of his hands to some person present.

" DOE
v.
HOLLOWAY.

The *Attorney-General* for the lessors of the plaintiff contended, that this was a sufficient execution of the power, since every requisite comprized in the power had been complied with, and that it was immaterial whether the execution was by a deed attested by two witnesses, or by a will sealed and delivered.

[432]

Marryatt for the defendant contended, that a will was not an instrument within the terms of the power, it was an instrument of a different nature, requiring the attestation of three witnesses, whereas two only were requisite under the power. He also contended that it was necessary to prove a delivery as of a deed.

Lord ELLENBOROUGH was of opinion, that the will was an instrument within the meaning of the terms of the power, and that since the will had been sealed and delivered in the presence of more than two witnesses, it operated as an appointment. He was also of opinion, that a delivery as a deed was not essential, and that the delivery which had been proved was sufficient.†

* * * * *

† See the cases of *Wright v. Wakeford*, 4 Taunt. 214 [overruled by *Doe d. Burdett v. Spilsbury*, 10 Cl. & F. 340]; *Doe on dem. Mansfield v. Peach*,

2 M. & S. 576, 15 R. B. 361, and note there; *Habergham v. Vincent*, 5 T. R. 92.

1816.
Dec. 7.

HILL v. GRAY.†

(1 Starkie, 434—436.)

[434].

The agent of the vendor of a picture knowing that the purchaser labours under a delusion with respect to the picture, which materially influences his judgment, permits him to make the purchase without removing that delusion. The sale is void.

THIS was an action of assumpsit to recover the sum of 1000*l.* for a Claude which had been sold by the plaintiff to the defendant.

[*435]

It appeared that a person of the name of Butt had been employed by the plaintiff to sell the picture in question: the defendant being desirous of purchasing it, pressed Butt to inform him whose property it was, which the latter refused to do. In the course of the treaty, Butt being at that time *employed in selling a number of pictures for Sir Felix Agar, the defendant, misled by circumstances, erroneously supposed that the picture in question was also the property of Sir Felix Agar. Butt knew that the defendant laboured under this delusion, but did not remove it, and the defendant, under this misapprehension, purchased the picture. The plaintiff offered to prove, by the testimony of the most eminent artists, that the picture was a genuine Claude, and of great value; and it appeared, that after the sale had been completed, and after the defendant had been informed that the picture was not the property of Sir Felix Agar, he had objected to the payment, not on the ground of any deception that had been practised with respect to the ownership, but on the ground that the picture was not a genuine Claude.

LORD ELLENBOROUGH :

Although it was the finest picture that Claude ever painted, it must not be sold under a deception. The agent ought to have

† The ruling of Lord ELLENBOROUGH in this case is difficult to reconcile with the general current of authority. See in particular *Smith v. Hughes* (1871), L. R. 6 Q. B. 597, 40 L. J. Q. B. 221. But, as explained by JERVIS, J. in *Keates v. Earl*

Cadogan (1851), 10 C. B. 591, at p. 600, 20 L. J. C. P. 76, at p. 78, and subject to the comment of Lord CHELMSFORD in *Peek v. Gurney* (H. L. 1873), L. R. 6 H. L. 377, at p. 390, 43 L. J. Ch. 19, at p. 34, it seems best to retain the case.—R. C.

cautiously adhered to his original stipulation that he should not communicate the name of the proprietor, and not to have let in a suspicion on the part of the purchaser, which he knew enhanced the price. He saw that the defendant had fallen into a delusion in supposing the picture to be Sir Felix Agar's, and yet he did not remove it. I take for granted that you will be able to prove, by the judgment of the first professional artists, that this is a genuine picture of Claude's, and it would not be possible to go further. In Italy the fact *might admit of other proof, as where a picture has been long preserved in a particular cabinet: here it can only be proved by the concurrent judgment of artists as to its similitude. This case has arrived at its termination; since it appears that the purchaser laboured under a deception, in which the agent permitted him to remain, on a point which he thought material to influence his judgment. I am of opinion that the contract is void.

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v.
GRAY.

[*436]

Plaintiff nonsuited.

BAKER v. TOWRY.†

(1 Starkie, 436—437.)

A vessel strikes upon a rock and remains fixed there for the space of fifteen or twenty minutes, in consequence of which she sustains a material injury. This constitutes a stranding.

1816.
Dec. 7.

[436]

THIS was an action on a policy of insurance on goods at and from Limerick to Cadiz. The only question was, whether the vessel had been stranded.

The vessel, with the insured goods on board, set sail on the 21st of June, 1814: on the 25th she encountered the Forge and rock Basket, which are a cluster of rocks extending about six miles in *length; the great Basket being about a cable's length from the main land, and the Forge rock being from thirty to forty feet in height above the level of the sea. A strong current setting in towards the land, the vessel could not avoid the rock, in attempting it she struck upon it, and remained there from a quarter of an hour to twenty minutes. In consequence of this

[*437]

† Compare *M'Dougle v. Royal Exchange Ass. Co.* (1816), 16 R. R. 532 (4 M. & S. 503).—R. C.

BAKER accident the vessel received considerable injury, and leaked much
 v.
 TOWRY. during her voyage to Cadiz.

Lord ELLENBOROUGH informed the jury, that if they were of opinion upon the evidence that the ship had been fixed, as stated by the witness, for the space of from fifteen to twenty minutes, it was sufficient to constitute a stranding.

1816.

Dec. 7.

FORSYTH AND OTHERS v. JERVIS.

(1 Starkie, 437—439.)

[437]

A brings an action against B for the price of a gun ordered by the latter, he may read in evidence, for a collateral purpose, part of a letter written by B to him; although the remainder of the letter contains directions for making the gun, and is not stamped as an agreement.

B agrees to purchase of A a gun for the sum of 45 guineas; but it is stipulated that A shall take a gun of B's, valued at 30 guineas, in part payment. B having refused to deliver his gun and complete the contract, A is entitled to recover the sum of 45 guineas as the stipulated price.

THIS was an action to recover the value of a gun, sold by the plaintiffs to the defendant.

[438]

The plaintiffs were gun-makers, and the defendant wishing to have a gun made by them, it was agreed that they should make one for the sum of forty-five guineas, but that they should take a gun of the defendant's, made by Manton, in part payment, at the estimated price of thirty guineas. The Manton gun had accordingly been delivered to the plaintiffs, but had been afterwards borrowed by the defendant; and the former, in order to shew that the Manton gun had been merely lent by them to the defendant, proposed to read a letter written to them by the defendant, requesting them to lend him the Manton gun for a few days for the purpose of snipe shooting. The letter also contained instructions as to the making of the new gun.

The *Attorney-General* and *Richardson* for the defendant objected, that since the letter had been written before the completion of the new gun, and since the new gun had been in fact

made according to the directions contained in the letter, it could not be read in evidence without an agreement stamp.

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v.
JERVIS.

Lord ELLENBOROUGH :

It cannot be read as evidence of the contract, but the plaintiffs may read that part of it which is necessary in order to shew the reason of taking away the Manton gun. It is certainly evidence for that purpose, although it may not be so for any other, and if they had had no other evidence to prove the contract they could not have used it.

It was afterwards objected, that since the contract in fact was to pay fifteen guineas, and to deliver the Manton gun for the new one, the plaintiffs were not entitled to recover more than the sum of fifteen guineas in this action for goods bargained and sold.

[439]

But Lord ELLENBOROUGH was of opinion, that since the contract was for the sale of goods to be in part paid for by the delivery of goods of a stipulated value, upon the refusal of the purchaser to pay for them in that mode a contract resulted to pay for them in money.

GREEN AND ANOTHER v. HAYTHORNE AND OTHERS.
(1 Starkie, 447—452.)

1816.
Dec. 11.

A at Bristol sells goods to B to be paid for by B's acceptance of a bill to be drawn by A : the goods are weighed, but remain in A's warehouse, and A omits to draw the bill. B sells a specific and ascertained portion of these goods to C in London, who pays for them and transmits B's order to A for the delivery of them. On the fourth day after A's receipt of the order B becomes bankrupt, and then, and not before, A refuses to deliver the goods to C, insisting that he has a lien upon them for the price. C may maintain trover against A ; for he was bound at all events to notify his refusal immediately. And (*semble*) having neglected to draw the bill, and having furnished B with samples to go into the market with, and having obeyed several orders of B's for the delivery of portions of the goods to different sub-vendees, he could not have insisted upon any lien, even if he had given immediate notice.

[447]

THIS was an action of trover, brought to recover the value of twelve bags of wool.

The defendants, who were Spanish merchants at Bristol, on

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 v.
 HAYTHORNE.

[*448]

the 8th of August, 1815, sold to Jarman and Lacy 68 bags of wool, which, by the invoice, were to be weighed off immediately, and were to be paid for by a bill of exchange, payable nine months after date; but no such bill was ever drawn by the defendants. The wools, which were of different qualities and values, and had been weighed, remained in the warehouse of the defendants, but samples were sent to Jarman and Lacy, the vendees, to enable them to go into the market, and upon sales by them from time to time, to different purchasers, of parts of this wool, orders were given to such purchasers, to enable them to receive the wool from the defendants, who delivered such parcels accordingly. On the 12th of October, the plaintiffs purchased from Jarman and Lacy twelve bags of this wool of a specified description, and Jarman and Lacy received the amount in Cassimeres. On the 16th of October, the plaintiffs in London, having *obtained an order from Jarman and Lacy for the delivery of the goods, transmitted it to them at Bristol, and required them to deliver the goods accordingly; but the order was not obeyed. On the 21st of October Jarman and Lacy became bankrupts. It also appeared, that at the time of the sale to the plaintiffs, twenty-two only of the bags were left in the defendants' warehouse, and that ten of these had been specifically appropriated.

Jerris for the defendants submitted, that this was nothing more than the ordinary case of a vendor and purchaser, the vendor remaining in possession, and that consequently, until the price had been paid, the defendants had a lien on the goods remaining in their hands, for the whole amount, and that although the plaintiffs might have paid the amount of the goods purchased by them to Jarman & Co., yet that with respect to the defendants, they did not stand in a better situation than Jarman & Co. would have done, who could not have insisted upon a delivery of the remaining bags, without payment. He also contended, that the sale had not been completed, so as to vest the property in the vendees; and he cited *Hanson v. Meyer*, 6 East, 614,† where the Court held, that a sale of starch was not com-

† 8 R. R. 572.

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plete, because the whole of it had not been weighed, although there had been a partial delivery. As between the defendants and Jarman and Lacy, the wool had been weighed; but as between the present parties, there had been no specific appropriation. In *Stoveld v. Hughes*, 14 East, 308,† great part of the *goods had been delivered, and the plaintiff was held to be entitled to recover the rest, because he had put marks upon them, and had measured them, and the vendors had assented to the sub-sale. But here there was no assent on the part of the vendors, on the contrary, he was in a situation to prove an express dissent.

[*449]

LORD ELLENBOROUGH :

I am of opinion that this was an executed contract. Here was a sale of 68 bags, which were delivered out by the vendors from time to time, according to the order of the vendees, who were furnished with an invoice, and with samples, to enable them to go into the market. With respect to the payment, the defendants were to take the first step, by drawing a bill, which they have omitted to do, but there was no resistance to the payment, and as far as appears, the vendees acceptance would have been given, and it was owing to the default of the vendor, that it was not given. Then as to the appropriation, the moment the 10 are deducted from the 22, the 12 remain, for which trover may be maintained, since there is no uncertainty on the subject. There is no doubt, therefore, either as to the quantum or as to quality, and after the time of the sale, the defendants' warehouse was the warehouse of the purchaser. I think, therefore, that the plaintiffs are entitled to recover.

Verdict for the plaintiffs.

In the ensuing term *Jervis* moved for a rule to shew cause why there should not be a new trial, contending that the defendants had a lien on the wool undelivered, which had never been removed from the warehouse; and that although the omission of the defendants to draw a bill upon Jarman and Lacy, might be considered as a waiver with respect to the wool actually delivered,

[450]

GREEN yet that it could not be so considered as to the portion which had
 v. not been delivered ; and that although the objection as to weigh-
 HAYTHORNE. ing, which in the case of *Hanson v. Meyer* was considered to be
 a condition precedent, did not apply to this case, yet still the
 acceptance of the bill was to be considered as a condition pre-
 cedent. And that the delivery of part could not be taken to
 be equivalent to a delivery of the whole in this case, as it was in
 the case of *Slubey and Smith v. Heyward and Fox*, 2 H. Bl. 504., †
 since in this case the remaining goods had never been removed
 from the warehouse of the defendants.

The COURT seemed to be inclined at first to give an opportunity
 for a further consideration of the question ; but upon advert-
 ing to the circumstance that the letter containing the order for the
 [*451] *delivery of the goods had been transmitted by the plaintiffs in
 London on the 16th to the defendants at Bristol, and that the
 defendants had not signified their dissent until after the insol-
 vency of Jarman and Lacy, which took place on the 21st, the
 Court were of opinion, that the defendants ought to have
 intimated their intention immediately upon their receipt of the
 plaintiffs' letter, and ought not to have delayed it until after the
 insolvency.

Jervis submitted that the defendants had notified their inten-
 tion as soon as they could reasonably have been required to do so.

But the COURT were clearly of opinion that the notice came too
 late ; if it had been a question as to reasonable time, the delay
 of four days between the receipt of the 'plaintiffs' letter on the
 17th, and the insolvency of Jarman and Lacy, might not have
 been considered as unreasonable ; but the defendants knew that
 they had not been paid by Jarman and Lacy, and ought to have
 signified their intention immediately, and if they had doubted on
 the subject, they ought to have written to the plaintiffs to inform
 them that they had not come to a decision, and they might have
 acted accordingly. The plaintiffs wrote on the 16th, upon the
 supposition that they had the entire power of disposing of the

† 3 R. R. 486.

goods: from the 17th, when the letter would have reached the defendants, four whole days elapsed, during which they reposed *in confidence on the credit of the original purchasers, and then the circumstance of the insolvency of those purchasers occurred, which made it convenient to the defendants to insist upon their suspended rights, which it was not competent for them to do. In the absence of notice they must be taken to have assented to the order.

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v.
HAYTHORNE.
[*452]

Rule refused.

EDGAR v. BLICK.

(1 Starkie, 464—466.)

1816.
Dec. 11.

The plaintiff had signified by a printed prospectus the terms on which he was ready to engage to perform particular services, in an action against one who had employed him to render those services under a parol agreement, he might read the printed prospectus to shew what the terms were, although it was not stamped :

[464]

Held, that an agreement to procure a situation for a medical man by the assignment of patients by a third person to whom a premium is to be paid is not illegal.

THIS was an action of assumpsit brought by the plaintiff, (who acted as a kind of medical broker) to recover at the rate of two and a half per cent. on a premium paid by the defendant, for being admitted into partnership with a medical gentleman, to whom the plaintiff had introduced him.

It appeared that the plaintiff had signified, by means of a prospectus, the terms on which he undertook to introduce applicants to partnerships or situations. Amongst others, was a condition, that the applicant should pay a fee of a guinea upon his first appearance, and should afterwards pay a per-centage of two and a half on the premium, when the agreement was signed. It also appeared, that on an application by the defendant for that purpose, the plaintiff had introduced him to a Mr. Wright who was in considerable practice, and to whom the defendant had subsequently paid a premium of 1,670*l.* to be admitted into partnership.

Topping for the defendant objected, that the printed prospectus could not be read in evidence without a stamp, since it

EDGAR
v.
BLICK. contained the terms of the agreement, upon which the plaintiff founded his claim.

[465] *Garrow*, A.-G. for the plaintiff answered, that the prospectus was not used as evidence of the agreement itself, but only as introductory, and to shew on what terms it was understood between the parties at the time of the parol agreement, that the service was to be performed.

LORD ELLENBOROUGH :

This was a parol contract, adopting the term of a written proposition previously existing. The prospectus is not evidence of the agreement itself, but had performed its office before the parol agreement was entered into.

By the terms of the prospectus, the remuneration for the plaintiff's services, was to become due upon the signing of the agreement between the parties.

Garrow, A.-G., submitted, that it would be sufficient for him to shew, that the defendant had been admitted into partnership with Mr. Wright, and that the premium had been paid. But,

LORD ELLENBOROUGH held, that the plaintiff could not proceed a single step further, without shewing that a written agreement had been signed, and that the most express parol agreement would not supply the deficiency.

A deed of co-partnership between the defendant and Wright was then put in.

[466] *Topping* objected, that on grounds of policy, an action for this species of brokerage was not maintainable.

LORD ELLENBOROUGH :

I will hear what the terms of the agreement are. I certainly do not approve of selling patients, and handing them over as a

species of property; it is indelicate, but I do not think that there is any thing criminal or immoral in it.†

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v.
BLICK

Topping afterwards addressed the jury, contending, that the plaintiff was not entitled to the per centage which he claimed since in fact he had performed no meritorious service whatsoever, having done nothing more, than barely introduce the parties to each other; and that as to the demand of a guinea, by way of admission-fee, he contended that there was evidence which shewed that it had been waived.

LORD ELLENBOROUGH left the facts to the jury, who found for the defendant.

CLUTTERBUCK v. CHAFFERS.

(1 Starkie, 471.)

1816.
Dec. 14.

[471]

In an action for a libel contained in a letter transmitted by the defendant to the plaintiff by means of a third person, it is a question for the jury whether there has been any publication of the libel except to the plaintiff himself, and if not, the defendant is entitled to their verdict.

THIS was an action for the publication of a libel.

The witness who was called to prove the publication of the libel (which was contained in a letter written by the defendant to the plaintiff) stated, on cross-examination, that the letter had been delivered to him, folded up, but unsealed, and that without reading [it, or allowing any other person to read it, he had delivered it to the plaintiff himself, as he had been directed.

LORD ELLENBOROUGH held, that this did not amount to a publication which would support an action, although it would have sustained an indictment; since a publication to the party himself tends to a breach of the peace.

Verdict for the defendant.

† See *Bunn v. Guy*, 7 R. R. 560 (1 Smith, 1, 4 East, 190); and *Broad v. Jolliffe*, Cro. J. 596.

1816.
Dec. 20.

JONES v. BOYCE.†

(1 Starkie, 493—496)

[493]

If through the default of a coach proprietor in neglecting to provide proper means of conveyance, a passenger be placed in so perilous a situation as to render it prudent for him to leap from the coach, whereby his leg is broken, the proprietor will be responsible in damages, although the coach was not actually overturned.

THIS was an action on the case against the defendant, a coach proprietor, for so negligently conducting the coach, that the plaintiff, an outside passenger, was obliged to jump off the coach, in consequence of which his leg was broken.

[*494]

It appeared that soon after the coach had set off from an inn, the coupling rein broke, and one of the leaders being ungovernable, whilst the coach was on a descent, the coachman drew the coach to one side of the road, where it came in contact with some piles, one of which it broke, and afterwards the wheel was stopped by a post. Evidence was adduced to shew that the coupling rein was defective, and that the breaking of the rein had rendered it necessary for the coachman to drive to the side of the road in order to stop the career of the horses. Some of the witnesses stated that the wheel was forced against the post with great violence; *and one of the witnesses stated, that at that time the plaintiff, who had before been seated on the back part of the coach, was jerked forwards in consequence of the concussion, and that one of the wheels was elevated to the height of eighteen or twenty inches; but whether the plaintiff jumped off, or was jerked off, he could not say. A witness also said, I should have jumped down had I been in his (the plaintiff's) place, as the best means of avoiding the danger. The coach was not overturned, but the plaintiff was immediately afterwards seen lying on the road with his leg broken, the bone having been protruded through the boot.

Upon this evidence, Lord ELLENBOROUGH was of opinion, that

† Applied and followed in *Adams v. L. & Y. Ry. Co.* (1869), L. R. 4 C. P. 739, 743, 38 L. J. C. P. 278; and in *The City of Lincoln* (1889), 15 P. D. 15, 18, 59 L. J. P. 1. See note at p. 796 above, and cp. *Coulter v. Express Co.* (1874) 56 N. Y. 585; *Twomley v. Central Park R. R. Co.* (1878) 69 N. Y. 158.—R. C.

there was a case to go to the jury, and a considerable mass of evidence was then adduced, tending to shew that there was no necessity for the plaintiff to jump off.

JONES
v.
BOYCE.

LORD ELLENBOROUGH, in his address to the jury, said :

This case presents two questions for your consideration ; first, whether the proprietor of the coach was guilty of any default in omitting to provide the safe and proper means of conveyance, and if you should be of that opinion, the second question for your consideration will be, whether that default was conducive to the injury which the plaintiff has sustained ; for if it was not so far conducive as to create such a reasonable degree of alarm and apprehension in the mind of the plaintiff, as rendered it necessary for him to jump down from *the coach in order to avoid immediate danger, the action is not maintainable. To enable the plaintiff to sustain the action, it is not necessary that he should have been thrown off the coach ; it is sufficient if he was placed by the misconduct of the defendant in such a situation as obliged him to adopt the alternative of a dangerous leap, or to remain at certain peril ; if that position was occasioned by the default of the defendant, the action may be supported. On the other hand, if the plaintiff's act resulted from a rash apprehension of danger, which did not exist, and the injury which he sustained is to be attributed to rashness and imprudence, he is not entitled to recover. The question is, whether he was placed in such a situation as to render what he did a prudent precaution for the purpose of self-preservation.—His Lordship, after recapitulating the facts, and commenting upon them, and particularly on the circumstance of the rein being defective, added : If the defect in the rein was not the constituent cause of the injury, the plaintiff will not be entitled to your verdict. Therefore it is for your consideration, whether the plaintiff's act was the measure of an unreasonably alarmed mind, or such as a reasonable and prudent mind would have adopted. If I place a man in such a situation that he must adopt a perilous alternative, I am responsible for the consequences ; if, therefore, you should be of opinion, that the reins were defective, did this circumstance create a necessity for what he did, and did he use proper caution

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BOYCE.
[*496]

*and prudence in extricating himself from the apparently impending peril. If you are of that opinion, then, since the original fault was in the proprietor, he is liable to the plaintiff for the injury which his misconduct has occasioned. This is the first case of the kind which I recollect to have occurred. A coach proprietor certainly is not to be responsible for the rashness and imprudence of a passenger; it must appear that there existed a reasonable cause for alarm.

The jury found a verdict for the plaintiff. Damages 300l.

1816.
Dec. 20.

ALDRIDGE v. BELL.

(1 Starkie, 498—499.)

[498]

An insured vessel arrives at the port of Kinsale on the 24th of November; on the 14th of December, a second survey is had, when it is found that the expenses of the repairs will exceed the value of the ship, notice of abandonment to the insurers in London on the 6th of January is too late.

THIS was an action on a policy of insurance upon the ship *Lion*, at and from Ferrol to London.

One question was, Whether an abandonment had been made in time. The *Lion* arrived at Kinsale on the 24th of November. The cargo was taken out on the 1st of December, and a survey was had on the 2nd, and also another on the 14th of December, when it was found that the repairs would exceed the value of the ship. The course of communication between Kinsale and London, where the insurers resided, was usually four or five days. The notice of abandonment was given on the 6th of January.

LORD ELLENBOROUGH held, that the abandonment was clearly out of time.

Verdict for the plaintiff, subject to the question, whether 30 per cent. was sufficient to cover a partial loss.†

† See *Mitchell v. Edie*, 1 R. R. 318 v. *Bonham* (C. P. 1821), 3 Brod. & (1 T. R. 608), Park on Insurance, tit. Bing. 147.—R. C.]
Abandonment. [And compare *Read*

BRIDGE v. WAIN.†

(1 Starkie, 504—506.)

1816.
Dec. 23.

[504]

Goods sold are described in the invoice, as scarlet cuttings: a warranty is to be inferred that the goods answered the known mercantile description of scarlet cuttings.

In an action of assumpsit it is alleged as a breach, that certain goods sold and delivered to the plaintiff, and warranted to be scarlet cuttings, were not scarlet cuttings, *per quod*, they became and were of no use or value to the plaintiff. The plaintiff is entitled, without any further allegation of special damage, to recover as much as the goods would have been worth to him had the contract been faithfully performed by the defendant.

THIS was an action of special assumpsit.

The declaration alleged, a purchase by the plaintiff from the defendant, of scarlet cuttings, to the amount of 90*l.* and all the counts, except the sixth and last count, alleged a special warranty by the defendant, that the scarlet cuttings were of a merchantable quality; the sixth count alleged an undertaking that they were scarlet cuttings.

It appeared in evidence, that scarlet cuttings consisted of small pieces of scarlet cloth, in which the English dealt with the Chinese to a considerable extent. It was also proved, that scarlet cuttings were understood in the market to mean cuttings of cloth only, without any admixture of serge or other materials, and that the article sold to the plaintiff did contain a quantity of serge, and that a part consisted of mere shreds of cloth much smaller than those usually sent, and that goods of this description would be very unprofitable, if not wholly unsaleable in China, and that a sale of such, without examination, might prove very detrimental to the trader, who would afterwards be regarded *with great suspicion in the Chinese market. No special warranty was proved, but it appeared, that in the bill of parcels the goods were described as scarlet cuttings.

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Upon its being objected that no warranty had been proved,

† Applied and followed in *Elbinger-Actien-Gesellschaft v. Armstrong* (1874), L. R. 9 Q. B. 473, 476, 43 L. J. Q. B. 211; and in *Hinde v. Liddell* (1875), L. R. 10 Q. B. 265,

269, 44 L. J. Q. B. 105. And see *Grébert-Borgnis v. Nugent* (1885), 15 Q. B. Div. 85, 54 L. J. Q. B. 511.—R. C.

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LORD ELLENBOROUGH :

If they were sold by the name of scarlet cuttings, and were so described in the invoice, an undertaking that they were such must be inferred. To satisfy an allegation, that they were warranted to be of any particular quality, proof must be given of such a warranty, but a warranty is implied that they were that for which they were sold.

Scarlett afterwards addressed the jury on the subject of damages; he also submitted to the Court, that since the plaintiff could not recover on any count except the sixth, since all the others alleged an express warranty, and since the breach alleged in the sixth count, was merely that “they were not scarlet cuttings, but shreds, serges, &c. and became and were of no use or value to the said plaintiff” the plaintiff was not entitled to recover any special damage whatever, no special damage having been alleged in the sixth count, and that he could not recover more than the mere difference in value between the article delivered, and that contracted for without reference to any specific *and particular loss resulting from the loss of sale in China.

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LORD ELLENBOROUGH (to the jury) :

The difficulty in this case, consists in ascertaining the damages sustained by the plaintiff, in consequence of his not having been furnished with proper scarlet cuttings; we have no account of the sum actually produced by the sales. Under the words of the sixth count, that they were of no use or value, you are to consider the effect of their being of no use or value in China. I am decidedly of opinion that by value, is to be understood, the value which the plaintiff would have received had the defendant faithfully performed his contract.

After his Lordship had fully commented upon all the facts of the case, the jury found a

Verdict for the plaintiff on the sixth count; damages 350l.

In the ensuing Term, *Scarlett* moved for a new trial, on the ground of a misdirection by his Lordship, on the subject of damages, but the Court refused a rule to shew cause, being of opinion that the plaintiff was entitled to recover under the sixth count, all the loss which he had sustained, in consequence of not having in China those goods which the defendant had undertaken to supply.

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— 23. Of ownership of goods. *See* Extent.

— 24. Of right of common. *See* Common.

— 25. Of accruer of cause of action. *See* Limitations, Statute of.

EXECUTION—Apparent possession—Goods sold under distress for rent and purchased by trustee under assignment.—Goods seized and sold by the landlord under a distress for rent without collusion, and purchased by a trustee of the tenant's estate under an assignment by such tenant, for the benefit of the creditors, out of the trust funds, are not liable to be taken in execution by an annuity and judgment creditor, although they are permitted by the trustees to remain in the possession of the tenant. *Guthrie v. Wood* 782

EXECUTOR—1. Injunction against intermeddling with effects.—Injunction to restrain defendant from receiving a testator's effects and to stay trial of actions, granted before answer, under the circumstances. *Mansfield v. Shaw* 201

— 2. Money lost while on deposit in executor's general account.—Testatrix directed her executor to sell two houses, and invest the produce (after payment of her debts) in real or Government securities, and to pay the interest to her three nephews until they attained twenty-one; and as each attained that age, to have one-third of the principal. The executor sold the houses, and applied part in payment of funeral expenses, &c. and paid the rest into his banker's hands, mixing it with his own money. The bankers failed: Held, that he was liable. *Fletcher v. Walker* 195

— 3. Promise of testator to pay debt.—A promise made upon good consideration by a testator, that his executor shall pay, is a sufficient consideration for an action in assumpsit against the executor. And in such action, it is neither necessary to aver assets, nor a promise by the executor. *Powell v. Graham* 593

And see Bankruptcy, 1.

EXTENT—Claimant's right to give evidence of ownership.—The inquisition to find debts, &c. on an extent, is not wholly an *ex parte* proceeding; and a claimant of property in the goods enquired of, may assert his claim before the sheriff, and put material questions to witnesses examined by him on the part of the prosecutor, in the way of cross-examination, to shew that the goods belong to him. And if the sheriff refuse to permit such interrogatories to be put, the Court will set aside the extent and inquisition. *R. v. Bickley* 634

FACTOR. *See* Principal and Agent; Goods, Sale of, 12.

FELONY—Assignment by felon. *See* Assignment.

FENCE, neglect to repair. *See* Negligence, 1.

FORCIBLE ENTRY—Writ of restitution.—Indictment for forcible entry charged that defendants into one messuage, &c. then and there being in the possession of one W. P., he, the said W. P., then and there being also seised thereof, with force and arms, &c. did enter, and the said W. P. from the peaceable possession with force and arms, &c. did put out. After convic-

tion of defendants: Held, that this was a sufficient averment of the present seisin of W. P. to warrant the Court in awarding a writ of restitution. *R. v. Hoare* 368

FRAUD. See Deed; Release; Vendor and Purchaser, 13, 15.

FRAUDS, STATUTE OF. See Contract, 1; Goods, Sale of, 10; Landlord and Tenant, 2; Licence.

GAME—Reservation of right of hunting and hawking does not include shooting.—An exception in a conveyance, made in 1655, of the free liberty of hawking and hunting, does not include the liberty of shooting feathered game with a gun. *Moore v. Earl of Plymouth* 604

GIFT.—A gift at law or in equity supposes some act to pass the property. If the subject is capable of delivery, delivery; if a chose in action, a release, or equivalent instrument; in either case, a transfer of the property is required. An intention to give is not a gift. *Hooper v. Goodwin* . . . 125

GOODS, SALE OF—1. Breach of contract—Measure of damages.—In an action of assumpsit it is alleged as a breach, that certain goods sold and delivered to the plaintiff, and warranted to be scarlet cuttings, were not scarlet cuttings, *per quod*, they became and were of no use or value to the plaintiff. The plaintiff is entitled, without any further allegation of special damage, to recover as much as the goods would have been worth to him had the contract been faithfully performed by the defendant. *Bridge v. Wain* . . . 815

— 2. Delivery.—Where a person who has contracted for the purchase of goods offers to re-sell them as his own, whether this is proof of a delivery to himself, is a question for the jury. *Blenkinsop v. Clayton* 602

— 3. Dock warrant indorsed in blank.—The pawnee of coffees, lodged in the West India Docks, and entered there in the pawnee's name, gave up to the pawnor certain delivery notes thereof called dock-warrants, having indorsed them with an order for the delivery of the goods to —, in exchange for a cheque for the price on the pawnor's banker, which cheque was dishonoured: the pawnor having contracted to sell the goods to the plaintiffs, received payment for them, and gave to the plaintiffs the delivery notes, with the blank above the defendant's signature for the name of the person to whom they were to be delivered: Held, that the defendant having entrusted the pawnor with his signature to a blank, purporting to authorize the delivery of the goods, and enabled him thereby to induce faith to a contract for the sale of the goods, and to obtain payment for them from the plaintiff, the contract of sale was the defendant's contract, and the payment a payment to the defendant. *Zwinger v. Samuda* 476

— 4. Communication of written order to wharfinger.—After a contract for the sale of goods, and a written order on the wharfinger for delivery, communicated to the wharfinger, and assented to by him, though no actual transfer be made in his books, the property passes to the vendee. *Lucas v. Dorrien* 480

— 5. Refusal of purchaser to deliver goods agreed to be taken in part payment.—B. agrees to purchase of A. a gun for the sum of 45 guineas; but it is stipulated that A. shall take a gun of B.'s, valued at 30 guineas, in part payment. B. having refused to deliver his gun and complete the contract, A. is entitled to recover the sum of 45 guineas as the stipulated price. *Forsyth v. Jervis* 804

— 6. Goods useless for purpose for which they were purchased.—Where utensils to be used in trade have been contracted for and delivered at a stipulated price, it is a question for the jury whether the vendee, who

complains that they are unfit for the purpose for which they were intended, has used them further than was necessary, in order to give them a fair trial. If after a reasonable trial the utensils are found to be unfit for such purpose, the vendor upon notice given, is bound to take them away; but if the vendee retain the utensils, without giving such notice, he is liable to pay for the value of the materials. *Okell v. Smith* 752

GOODS, SALE OF—7. Latent defect in article sold.—A. sells and delivers to B., without a price being specified, a bowsprit which at the time of sale appears to be perfectly sound, but which, after being used some time, turns out to be rotten: in the absence of fraud A. is entitled to recover from B. what the bowsprit was apparently worth at the time of delivery. *Bluet v. Osborne* 785

— 8. Picture—Misapprehension as to ownership.—The agent of the vendor of a picture, knowing that the purchaser labours under a delusion with respect to the picture which materially influences his judgment, and to which the agent's conduct has contributed, permits him to make the purchase without removing that delusion. The sale is void. *Hill v. Gray* 802

— 9. Part-payment.—If a purchaser of goods draws the edge of a shilling over the hand of the vendor, and returns the money into his own pocket, which in the north of England is called the striking off a bargain, this is not a part payment within the Statute of Frauds. *Blenkinsop v. Clayton* 602

— 10. Recovery of price of goods—Dishonoured bill.—The vendor of goods being paid for them by a bill at one month after sight, given by the purchaser's banker for a larger sum than the price, the vendor repaying the difference, is not, upon the bill's being dishonoured, precluded from recovering against the buyer the price of the goods. *Fry v. Hill* 512

— 11. Right of principal to sue for price of goods notwithstanding del credere commission.—Where a factor, having a *del credere* commission, sold goods for the plaintiffs to defendant without disclosing their names, the defendant knowing that he was factor, and the plaintiffs, according to the settled course of dealing between them, drew on the factor for the amount, who before the bills became due stopped payment, and afterwards became bankrupt: Held, that notwithstanding the *del credere* commission, the plaintiffs might sue the defendant for the price of the goods, the balance of the account current between the factor and defendant being at the time he stopped payment in favour of the factor, but at the time of action brought in favour of defendant. *Hornby v. Lacy* 345

— 12. Variation between bought and sold notes.—A vendee of goods is bound by the contract, as stated in the note signed by him, and delivered by the broker who effected the sale to the vendor, although this note varies from the note delivered by the broker to the vendee. *Rowe v. Osborne* 754

— 13. Vendor's lien.—A. at Bristol sells goods to B. to be paid for by B.'s acceptance of a bill to be drawn by A.: the goods are weighed, but remain in the warehouse of A., who omits to draw the bill. B. sells a specific and ascertained portion of these goods to C. in London, who pays for them, and transmits B.'s order to A. for the delivery of them. On the fourth day after A.'s receipt of the order, B. becomes bankrupt, and then, and not before, A. refuses to deliver the goods to C., insisting that he has a lien upon them for the price. C. may maintain trover against A.; for he was bound at all events to notify his refusal immediately. *Green v. Haythorne* 805

— 14. Warranty of quality.—Goods sold are described in the invoice, as scarlet cuttings, a warranty is to be inferred that the goods answered the known mercantile description of scarlet cuttings. *Bridge v. Wain* 815

And see Bankruptcy, 3.

GUARANTY. See Contract, 1; Principal and Surety.

HORSE—Unsoundness.—An infirmity which renders a horse less fit for present use and convenience is an unsoundness; it is not essential that the infirmity should be of a permanent nature. *Elton v. Jordan* . . . 754

— **Death caused through defective repair of fence.** See Negligence, 1.

HUNTING. See Trespass.

HUSBAND AND WIFE—Letters written by wife to husband, while living apart from him. See Evidence, 6.

INCOME TAX—"Persons residing in Great Britain."—A statute imposing a duty on the property of persons residing in Great Britain, applies to persons residing there for any length of time, however short, although they may, at the same time, have a more permanent residence elsewhere. *Attorney-General v. Coote* . . . 692

INFANT—1. Appearance by attorney. See Practice, 1.

— 2. Indorsement of bill by. See Bill of Exchange, 4.

INJUNCTION—Statutory works—Insufficient funds pending application for further powers.—The insufficiency of funds for the completion of an undertaking, pending an application to Parliament for further powers to levy money, is no ground for an injunction to restrain the promoters of the undertaking from commencing the contemplated works on their own land. *The Mayor and Burgesses of King's Lynn v. Pemberton* . . . 62

And see Executor, 1; Landlord and Tenant, 8; Nuisance; Waste.

INSURANCE (MARINE)—1. Abandonment—Notice.—An insured vessel arrives in port on the 24th November; on the 14th December, a second survey is had, when it is found that the expenses of the repairs will exceed the value of the ship. Notice of abandonment to the insurers in London on the 6th January is too late. *Aldridge v. Bell* . . . 814

— 2. Alteration in policy after signature.—If the assured, after subscription by the underwriter, strikes out with a pen the time of warranty of sailing, which stood in the body of the policy, and inserts in a memorandum in the margin a different time for sailing, which the underwriter does not sign, the assured thereby destroys the policy, and the underwriter is discharged from the original contract. *Fairlie v. Christie*. . . 615

— 3. Barratry of master.—Improper treatment of the vessel by the captain will not constitute barratry, although it tend to the destruction of the vessel, unless it be shewn that he acted against his own judgment. *Todd v. Ritchie* . . . 768

— 4. Barratry of owner—Act done in fraud of freighter during continuance of charter-party.—Where the owner of a ship, by his contract, places the entire vessel for a time under the sole control of the freighter, during that time any act of the owner of the vessel, done in fraud of the freighter, is an act of barratry. *Soares v. Thornton* . . . 615

— 5. Embargo—Delay in voyage.—A vessel chartered to a port of America laden with salt, to bring home a return cargo of timber, entered the port during an embargo, under which it was permitted her, upon the notification of the embargo, to return with the cargo on board, or to discharge her cargo, and return in ballast. She discharged her cargo, remained eighteen months there, till the embargo ceased, then shipped her homeward

cargo, and was lost : Held, that she was not bound to have returned with her cargo of salt, or to have sailed in ballast; and that the underwriters on ship were still liable. *Schroder v. Thompson* 540

INSURANCE (MARINE)—6. **Illegality of voyage—Recovery of premium.**—If a policy of assurance be in its language large enough to comprise an illegal adventure, and the assured contemplated an illegal adventure, the underwriter is not entitled to sue for the premium. *Jenkins v. Power* 375

— 7. — An assured, upon a policy affected in terms sufficiently large to comprehend an illegal adventure, and who intends thereby to cover an illegal adventure, cannot recover back the premium without some formal renunciation of the contract made known to the underwriter before the bringing of the action, although the adventure is never entered upon. *Palyart v. Leckie* 381

— 8. **Insurable interest.**—An allegation that the policy has been effected for the plaintiffs by A., B., and C., is satisfied by proof that it was effected by the firm A. and B., there being in fact two firms which have two members in common. *Dickson v. Lodge* 764

— 9. **Licence to trade.**—A licence to export must be more strictly conformed to than a licence to import. *Tulloch v. Boyd* 546

— 10. — Under a licence to export to a hostile country within a limited time, a ship clearing at the Custom-house in London on the day before the licence expires, but delayed in the river by the breaking of a bowsprit, and consequently not obtaining her clearing note at Gravesend till two days after the expiration of the licence, is not deemed to have exported within the time limited.

If a ship, licensed to export to a hostile country, do not sail within the time limited by the licence, though she were delayed by an accident, she is not protected by the licence. *Williams v. Marshall* 542

— 11. **Set-off by broker of losses against premiums.**—A broker, indebted for premiums of insurance on policies subscribed by an underwriter who had since become bankrupt, had a *del credere* commission on one of the policies, effected in the name, not of the broker, but of the assured, and expressed in the body thereof. The broker was not entrusted with the custody of the policy. A loss happened before the bankruptcy; and, before the commission, the broker paid the loss to the assured : Held, that he could not set off that loss against the premiums due to the assignees of the bankrupt. *Peele v. Northcote* 549

— 12. **"Stranding."**—A vessel strikes upon a rock and remains fixed there for a space of fifteen or twenty minutes, in consequence of which she sustains a material injury. This constitutes a stranding. *Baker v. Towry* 803

INTEREST, on refunded deposit. See Vendor and Purchaser, 9.

And see Principal and Surety, 3.

INTERNATIONAL LAW—Confiscation of debt by foreign state—Ordinance "not conformable to the usage of nations."—An ordinance made by the government of Denmark pending hostilities with Great Britain, whereby all ships, goods, money and money's worth, of or belonging to English subjects, were declared to be sequestrated and detained; and all persons were commanded, within three days, to transmit an account of debts due to English subjects, in default of which they were to be proceeded against in the Exchequer; in consequence of which, a suit then depending in the Danish court for recovering a debt due from a Danish to a British subject was not further prosecuted, and the debt was afterwards paid by the Danish subject, at the rate specified by the ordinance, to commissioners appointed in virtue

of the ordinance to receive payment, upon production of whose receipt the Danish court quashed the suit: Held, no answer to an action against the Danish subject to recover the same debt in the Courts of this country: for the ordinance, not being conformable to the usage of nations, was void. *Wolff v. Oxholm* 313

JURY—1. **Method of striking coroner's special jury.**—In striking a special jury, the coroner is not bound to take the jurors as they occur upon the sheriff's books, but is to make a selection; and where he had made such selection impartially, the Court refused to cancel the list of persons so selected. *R. v. Wooler* 460

— 2. **Verdict not understood by whole of jury.**—The affidavits of individual jurors to impugn a verdict recorded, on the ground that it was not given with their assent, are not receivable; but the affidavits of bystanders as to what passed within their knowledge touching the delivery of the verdict and dissent of some of the jury at the time, are admissible; and if the Court see reason to think that some of the jury may not have heard what passed at the time of delivering the verdict by the foreman, they will direct a new trial, and will not, at defendant's request, merely vacate the verdict, in order that it may be tried by the same panel as if no trial had taken place. *R. v. Wooler* 402

LANDLORD AND TENANT—1. **Agreement to let premises already in occupation of another.**—Where premises had been let to B. for a term determinable by a notice to quit, and pending such term C. applies to A., the landlord, for leave to become the tenant instead of B., and upon A. consenting, agrees to stand in B.'s place, and offers to pay rent: Held, that (though B.'s term had not been determined either by a notice to quit or a surrender in writing), A. might maintain an action for use and occupation against C., and that the latter could not set up B.'s title in defence to that action. *Phipps v. Sculthorpe* 426

— 2. **Agreement to take lodgings—Statute of Frauds.**—An agreement to occupy lodgings at a yearly rent, payable quarterly (the occupation to commence on a future day,) is an agreement relating to an interest in land, within the meaning of the fourth section of the Statute of Frauds. *Inman v. Stamp* 740

— 3. **Agreement to grant lease.**—Specific performance of a parol agreement to grant a lease decreed on the testimony of one witness, confirmed by circumstances, against the denial in the answer, after part-performance by delivery of possession. *Morphett v. Jones* 48

— 4. **Covenant—Not to assign.**—In ejectment on a clause of re-entry in case the tenant should assign, set over, or otherwise let the demised premises, it is not sufficient to prove the defendant a stranger in possession of the demised premises, and his declaration that they were demised to him by another stranger.

And such evidence would not be sufficient, even if the tenant had covenanted not to part with the possession. *Doe v. Payne* 747

— 5. **Covenant to repair.**—An action upon the case in the nature of waste cannot be supported against the assignee of a lease, in which the lessee had covenanted, "from time to time, and at all times during the term, when need should require, sufficiently to repair the premises, with all necessary reparations, and to yield up the same so well repaired at the end of the term, in as good condition as the same should be in when finished under the direction of J. M.," upon a breach that the defendant suffered the premises to become and be in decay and ruinous during a large part of the term, and after the term wrongfully yielded them up in much worse order and condition than when the same were finished under the direction of J. M. *Jones v. Hill* 508

LANDLORD AND TENANT—6. Qualified covenant to pay rent.

—Lease by plaintiff to J. T. for years of a messuage and farm, at a yearly rent, payable quarterly. J. T. covenants to pay the rent on the days and in manner therein mentioned, and also to pay interest in case the rent should be behind three quarters; and defendant covenants that J. T. shall at all times during the term, well and truly pay to plaintiff the said rent on the respective days, and also interest, and shall duly observe all the covenants, and that in case J. T. should neglect to pay the rent for forty days, defendant shall pay on demand: Held, that the defendant was not chargeable until after forty days and demand made. *Sicklemore v. Thistleton* . . . 280

— 7. Breach of covenant brought about by wilful act of lessee.—A proviso in a lease, whereby the rent is payable on a day certain at the mansion house of lessor, that if the rent shall be unpaid for forty days after the day whereon it is reserved (although not demanded), the lease shall be void, does not make the lease voidable by the lessee by reason of his having overstayed the forty days allowed for payment. *Rede v. Farr* 329

— 8. Ejectment—Injunction to restrain distress pending settlement of dispute as to landlord's title.—A lessee proceeded against by ejectment after notice from a claimant disputing his landlord's title not to pay him any more rent; and who has been threatened with a distress by his landlord if he does not, cannot sustain an injunction to restrain the distress; for he is not permitted by such means to bring his landlord's title into dispute. *Homan v. Moore* . . . 684

— 9. Proof of execution of lease.—In covenant the plaintiffs declare, that A., B., C., and D., by indenture demised to defendant and made *proferet* of the counterpart. Plea, *non est factum*.

After proof of the execution of the counterpart by defendant, it is competent to him to produce the demising part, to shew that only two of the four lessors executed it. *Wilson v. Woolfryes* . . . 396

— 10. Property tax—Tenant's right to recover for arrears of tax.—An occupier of lands having, during a course of twelve years, paid to the collector of taxes the landlord's property-tax, and the full rent as it became due to the landlord, without claiming any deduction on account of the tax so paid: Held, that the occupier could not recover back from the landlord any part of the property-tax so paid. *Denby v. Moore* . . . 444

— 11. Re-entry—Waiver of right.—A lease contains a proviso for re-entry, in case the rent shall be twenty-one days in arrear, and there shall be no sufficient distress on the premises; the landlord, who distrains before the expiration of the twenty-one days, but continues in possession of the distress upon the premises until after the expiration of twenty-one days, does not thereby waive his right of re-entry.—*Doe d. Taylor v. Johnson* 791

— 12. Use and occupation.—Action for use and occupation. Plea, that plaintiff, before action, took and detained as a distress for the rent, goods of value sufficient to satisfy the same: Held, that this plea, not shewing that the rent was satisfied, was bad. *Lear v. Edmonds* . . . 448

— 13. — A. lets lands to B., who underlets to C. and others; during these tenancies, A. gives notice to C. and the other under-tenants to quit, and C. does quit, and the lands before occupied by him remain unoccupied for a year, and are then again let by B.; A. cannot recover against B. for the use and occupation of this land for the year. And *semble*, an eviction might be pleaded to the whole demand. *Burn v. Phelps* . . . 749

And see Contract, 1; Execution.

LIBEL. See Defamation.

LICENCE—Parol grant.—A beneficial licence to be exercised upon land may be granted without deed and is not an interest in land within the Statute of Frauds [but see *Wood v. Leadbitter*, 13 M. & W. 838, 852]. *Taylor v. Waters* 499

LIEN—Carriage—Permitting removal from time to time.—A. having repaired a carriage for B., allows him to take it away from time to time; he cannot afterwards detain it for the amount of the repairs: neither can he detain it upon a claim for standage, without an express contract to pay for standage, or unless the owner leaves it upon the premises beyond a reasonable time after notice. *Hartley v. Hitchcock* 790

And see Goods, Sale of, 13.

LIMITATION. See Settlement (Marriage), 2—5.

LIMITATIONS, Statute of. See Trespass.

MALICIOUS PROSECUTION—Alleged variance between evidence and pleadings.—Where plaintiff declared, in case for a malicious prosecution, that defendant maliciously, &c. charged the plaintiff with having feloniously stolen certain articles, his property, and it was proved that defendant laid an information before a magistrate, in which he deposed that the said articles had been feloniously stolen, and that he suspected and believed, and had good reason to suspect and believe, that they had been stolen by the plaintiff: Held, that the evidence supported the declaration by showing a substantial charge of felony. *Diss. Bayley, J. Davis v. Noake* 290

MANOR. See Copyhold.

MONEY PAID—In discharge of Promissory Notes illegally obtained. See Creditors' Deed.

MORTGAGE—1. Allowance to mortgagees for collection of rents.—Mortgagee allowed the expense of a receiver, the mortgaged property consisting of small houses at small rents, and the mortgagee living at a distance. *Davis v. Dendy* 209

— 2. Distinction between principal and interest.—A principal sum secured by deed, and the interest stipulated to be payable thereon, are two distinct sums and not one entire sum, and either may be sued for independently of the other.

Interest is not a part of the debt secured by mortgage, but rather sounds in damages, although, *semble*, it may be sued for in debt. *Dickenson v. Harrison* 711

— 3. Costs of resisting redemption.—On a bill to redeem, the mortgagee insisted that W. B., the heir at law, stated in the bill to be dead, was alive. A reference was twice made to the Master, to ascertain whether W. B. was dead. The master reported he was dead. Exceptions were taken to his reports, and an issue was directed whether W. B. was dead, &c. The jury found he was dead. Exceptions were then overruled; and held, the mortgagee ought not to pay the costs of the issue. *Wilson v. Metcalfe*. 193

— 4. Redemption—Costs.—Mortgagor filing a bill to redeem must pay the costs of defendants claiming under the mortgagee. *Wetherell v. Collins* 229

— 5. Right of mortgagee of term to account of rents after expiration of term.—A mortgagee of a term created for raising portions, and

expired, is not entitled to an account of rents and profits in the hands of a receiver, accrued before the expiration of the term.

The appointment of a receiver is for the benefit of incumbrancers only so far as expressed to be for their benefit, and as they choose to avail themselves of it.

A mortgagee of a term is not entitled to a retrospective account of rents and profits. *Gresley v. Adderley*. *Gresley v. Heathcote* . . . 146

MORTMAIN, Statute of. See Will, 3.

NEGLIGENCE—1. **Death of horse caused through non-repair of fence**—Action by gratuitous bailee.—A. sends his horse, for the night, to B., who turns it out after dark into his pasture-field, adjoining to and separated from a field of C. by a fence, which C. was bound to repair; the horse, from the bad state of the fence, falls from one field into the other, and is killed: Held, that B., though a gratuitous bailee, might maintain an action against C. and recover the value of the horse. *Rooth v. Wilson* 431

— 2. **Schoolmaster permitting pupil to discharge fire-works.**—A schoolmaster who permits an infant pupil under his care to make use of fire-works is responsible in an action for the mischief which ensues. (*Dictum*, per Lord Ellenborough.) *King v. Ford* . . . 794

— 3. **Stage-coach—Hazardous driving.**—The driver of a carriage upon a public road is not entitled to adopt an obviously hazardous course merely because in so doing he keeps to his own side of the road. *Mayhew v. Boyce* . . . 796

— 4. **Liability for injuries to passenger who jumps from coach to avoid greater danger.**—If through the default of a coach proprietor in neglecting to provide proper means of conveyance, a passenger be placed in so perilous a situation as to render it prudent for him to leap from the coach, whereby his leg is broken, the proprietor will be responsible in damages, although the coach was not actually overturned. *Jones v. Boyce* 812

And see Carrier; Trespass.

NOTICE. See Vendor and Purchaser, 12.

NUISANCE—1. **Purpresture.**—On the filing of an information by the Attorney-General at the relation of an individual, and a bill by the relator, the Lord Chancellor granted an injunction *ex parte*, on affidavits, to restrain a purpresture in the river Thames, which amounted *prima facie* to a public nuisance.

And it was held to be immaterial to whom the soil belonged, it not being competent either to the Crown or to a subject, to use it for any purpose amounting to a nuisance. *The Attorney-General v. Johnson* . . . 156

— 2. **Setting dog-spears.**—The defendant was owner and occupier of a wood adjoining a wood of B., divided therefrom by a low bank and a shallow ditch, not being a sufficient fence to prevent dogs from passing from B.'s wood into the defendant's wood. There were public footpaths through the defendant's wood, not fenced off therefrom. The defendant, to preserve hares in his wood, kept iron spikes fastened to several trees in his wood, each spike having two sharp ends, and so placed that each end should point along the course of a hare-path and purposely placed at such a height from the ground, as to allow a hare to pass under them without injury, but to wound and kill any dog that might run against one of the sharp ends: none of them was at a less distance than 50 yards from any footpath, and some were from 150 to 160 yards distant therefrom. The defendant gave notice on boards, that steel-traps, spring-guns, and dog-spikes were set in the wood for vermin. The plaintiff, with B.'s permission, was sporting in

his wood with a valuable pointer; a hare rose in his wood, and was pursued by the dog into the defendant's wood, and in the pursuit ran against one of the spikes, and was killed. The plaintiff endeavoured, without success, to prevent his dog from pursuing the hare into the defendant's wood. The plaintiff having brought an action against the defendant to recover compensation for the loss of his dog, the Court was equally divided in opinion whether the action were maintainable. *Deane v. Clayton* . . . 553

PALACE, Arrest within. See **Arrest, 2.**

PARTNERSHIP—1. Articles—Supplementary deed providing for disposal of share in case of bankruptcy.—Articles of partnership having provided, that on dissolution by death, notice, or misconduct, of a partner, the remaining partners should have the option of taking his share at a valuation, payable by yearly instalments in the course of seven years: and that on the bankruptcy or insolvency of a partner, the partnership should be immediately void as to him; by a deed, four years subsequent, the partners declared (after a recital that such was their intention in the articles), that in the event of bankruptcy or insolvency, the same arrangement should be practised as on dissolution by death, notice, or misconduct: one of the partners having become bankrupt within a few months after the execution of the latter deed, his assignees are not bound by it. *Wilson v. Greenwood* . . . 118

— 2. — **Omission for several years to carry out stipulation in articles—Waiver.**—Stipulations in articles of partnership for an annual settlement of accounts, and for payment to the representatives of a deceased partner of an allowance in lieu of profits since the last actual account, proportioned to the amount of his share of profits, during two years preceding, are waived in equity by omission through several years to settle annual accounts, and by engaging in business in which the stipulations cannot be applied without injustice. *Jackson v. Sedgwick* . . . 109

— 3. **Bank—Change in firm—Liability of old partners for money continued on deposit.**—A person depositing money with bankers, and taking their accountable receipts, does not—by continuing to leave his money in the bank after a dissolution of the original firm and the constitution of a new one, which consists of some of the members of the old bank and of other persons—discharge the former partners who have gone out, although he receives interest regularly from the new firm, gives them no notice, and continues to transact business with them in the common course, for a period of four years, and until they become insolvent. *Gough v. Davies* . . . 697

— 4. **Bill accepted in firm name after, but dated before, dissolution.**—After the actual dissolution of a partnership between A. and B., A. accepts the bill in the name of the partnership, bearing date before the dissolution: an indorsee who takes the bill without notice of the dissolution cannot enforce the bill against B. *Wrightson v. Pullan* . . . 784

— 5. **Dissolution—Return of premium.**—Return of premium on partnership ordered under circumstances where there was a substantial failure of consideration caused by the action of the partner receiving the premium. *Hamil v. Stokes* . . . 690

— 6. **Dormant partner's liability for goods supplied to firm.**—A creditor is entitled, although he has dealt with the ostensible partner as his debtor, to sue a dormant partner—if unknown to him to be so at the time of furnishing the subject matter of the debt—for whatever had been supplied to the firm during the partnership. *Robinson v. Wilkinson* . . . 659

— 7. **Duration.**—R. C., being in possession of mines and ironworks, held under leases of unequal duration, by his will bequeathed 25,000*l.* to B., "as a capital for him to become a partner with my executor of one-fourth

share in the trade of all those works, so long as the lease endures," with a devise to H. and his wife of the residue of his estates, real and personal; by a codicil the testator gave to W. C. three-eighths of the concern at the iron-works, "so the partnership will stand at my decease, W. C. three-eighths, H. three-eighths, B. two-eighths." After the testator's death, W. C., H., and B., carried on the works for two years, selling iron manufactured not only from the produce of their mines, but from ore and old iron purchased for the purpose of manufacture and resale. B. having then assigned his share to C., the business was carried on in like manner by C. and H. till the death of the latter; no agreement having ever been entered into for the duration of the partnership.

1. The codicil withdraws the trade from the operation of the residuary clause in the will, and vests three-eighths in H. to the exclusion of his wife.

2. The concern is not a mere joint interest in land, but a partnership in trade.

3. The purchase of a leasehold interest as part of a stock in trade, is not evidence of an agreement to contract a partnership commensurate with the duration of the lease.

4. The partnership is dissolved by the death of H.

5. In a suit instituted by W. C., praying a sale of the partnership property, the Court, on motion, directed an inquiry whether it would be for the benefit of all parties interested that the works should be sold, or carried on for the purpose of winding up the concern. *Crawshay v. Maule* . . . 126

PARTNERSHIP—8. Goodwill.—F., on entering into articles of partnership with B., paid a premium; F. dies. After his death, B. sold the goodwill of the trade: Held, that the representative of F. was not entitled to a share of the money for which such goodwill sold.

Seemle, on a partnership between professional persons, the goodwill of a business, on the death of one, survives. *Farr v. Pearce* . . . 196

— 9. Holding out son as partner.—A father who holds out to the world that his son (who is an infant) is his partner, and who sends bills and signs receipts in their joint names, is not precluded from shewing that he himself was the sole proprietor. *Glossop v. Colman* . . . 741

— 10. Parol evidence of partnership.—In an action against one of several members of a society established under a deed of co-partnership for goods supplied to the society, the defendant may be proved to be a partner by parol evidence without producing the deed. *Alderson v. Clay* . . . 788

— 11. Payment to one partner after dissolution.—Notice.—Payment to one of two partners of a partnership debt, after they had appointed a third person to collect the debts, and with notice of such appointment, held good. *Porter v. Taylor* . . . 338

— 12. Evidence of notice of dissolution. See Evidence, 9.

And see Bankruptcy, 4, 5; Evidence, 16, 17; Principal and Surety, 2.

PATENT—1. Specification.—In the specification of a patent for an improved instrument, it is essential to point out precisely what is new and what is old, and it is not sufficient to give a general description of the construction of the instrument without making such distinction, although a plate is annexed, containing a detached and separate representation of the parts in which the improvement consists. *Macfarlane v. Price* . . . 760

— 2. — A patent for an improved mode of lighting cities, towns, and villages, is not infringed by a specification describing an improved lamp. *Lord Cochrane v. Smethurst* . . . 761

— 3. — Principle must be new.—A patentee in the specification sums up the principle in which his invention consists; if this principle be not new the patent cannot be supported, although it appear that the application of the principle, as described in the specification, is new. *R. v. Cutler* . 780

PAYMENT. *See* Partnership, 11.

PILOT. *See* Ship, 2.

PLEADING. *See* Practice, 9—15; Criminal Law; Principal and Surety; Tender.

POOR LAW—1. Time for trial of appeal against order of removal.—Where an order of removal was made on the 2nd January and served on the 7th, and the sessions were holden on the 14th, and the appellant parish was fifteen miles from the place of holding the sessions, by the practice of which sessions eight days' notice was required in order to enable an appellant to enter and try his appeal: Held, that the appellant might pass by the first sessions, and give notice for, and enter and try his appeal at, the following sessions. *R. v. The Justices of Southampton* 420

— 2. Custody of document appointing overseer. *See* Evidence, 4.

POWER—1. Condition becoming impossible.—Devise and bequest of lands and furniture to A. H., testator's wife, for life, and after her death to H. L. and her assigns for life, in case she continued single and unmarried, or married with the consent of A. H., or after her death, with the consent of J. T. and T. L., or the survivor; and after the decease of H. L., unto such persons as she should by deed or will appoint:

Held, that the condition was a condition subsequent; and as the compliance with it had become impossible by the death of A. H., J. T., and T. L., the estate for life of H. L. became absolute, and her marriage without consent did not determine the power. *Aislalie v. Rice* 230

— 2. Consent—Subsequent ratification of act.—Power to trustees, with consent of A. under her hand, with two witnesses, to advance 1,500*l.* to her husband. They advance the money, without the consent of A. Afterwards A., by an instrument under her hand, attested by two witnesses, testifies that the money was advanced with her consent: Held, on a bill filed by A., that the trustees must refund the 1,500*l.* *Bateman v. Davis* . . . 200

— 3. Execution by will.—An estate is settled to the use of such person, &c. as J. B. shall by any writing, &c. signed, sealed, and delivered by him, in the presence of two or more witnesses, direct, limit, and appoint. J. B. may execute this power by his will, signed, sealed, and delivered in the presence of three witnesses. *Doe d. Delegal v. Holloway* 800

PRACTICE—1. Appearance of infant by attorney.—If a minor defendant appears by attorney, the Court will, at the instance of the plaintiff, compel an amendment of the appearance by substituting a guardian. *Hindmarsh v. Chandler* 552

— 2. Costs.—Persons nominated trustees by an instrument which, being void, passes no trust fund, not allowed costs, as between solicitor and client. *Mohun v. Mohun* 58

— 3. — In an action for maliciously holding the plaintiff to bail he is entitled in the calculation of damages to recover, not merely the taxed costs, but as between attorney and client. *Sandback v. Thomas* . . . 771

— 4. Security for costs—Plaintiff under sentence of transportation.—Where the plaintiff, after issue joined, has been convicted of felony, and received sentence of transportation, the Court will compel him or his attorney to give security for costs retrospective and prospective. *Harvey v. Jacob* 450

PRACTICE—5. Security for costs—One plaintiff within jurisdiction.—If one plaintiff be in this country and liable for costs, though another is resident abroad, the Court will not compel the latter to give security for the costs. *Anonymous* 489

— 6. **Interpleader.**—The Court will order defendants to interplead, although one of them has not appeared to the bill, provided the usual process of contempt has been gone through. *Fairbrother v. Prattent* . . . 731

— 7. **New trial.**—Where the defendant has been acquitted on an indictment for not repairing a road, the Court will not grant a new trial; yet they will, under very special circumstances, suspend the entry of judgment, so as to enable the parties to have the question reconsidered upon another indictment, without the prejudice of the former judgment. *R. v. The Inhabitants of Wandsworth* 434

— 8. — Where, upon the facts proved, an inference of law arises on a statute not remembered at the trial, the Court will sometimes grant a new trial, though the point was not taken below. *Ritchie v. Bowsfield* . . . 490

— 9. **Pleading—Allegation in declaration not supported by evidence.** *Wilson v. Woolfryes* 396

— 10. — **Alleged variance between evidence and declaration.**
See Malicious Prosecution.

— 11. — **Defect in declaration.** *See Replevin.*

— 12. — **In action for use and occupation.** *See Landlord and Tenant, 12.*

— 13. — **Plea in abatement of action in tort.** *See Carrier, 1.*

— 14. **Sham plea.**—The plaintiff cannot treat a plea as a nullity, and sign judgment, unless it be palpably a sham plea. *Bell v. Alexander* . . . 333

— 15. — The plaintiff may sign judgment as for want of a plea if the plea be palpably a sham plea. *Phillips v. Bruce* 334

— 16. **Notice of action.** *See Taxes.*

And see Criminal Law; Principal and Surety.

PRINCIPAL AND AGENT—Right of factor to pledge goods.—Plaintiffs, having gums for sale warehoused in their names at the London Docks, received from C., a broker, a sold note, not disclosing the name of any purchaser, and gave C. an order on the Docks for the weighing and transfer of the gums to his order, and sent him an invoice as for gums bought of them by C., and having called upon him to settle for the gums as per contract, drew on H. for the price, which bills were accepted by H., and guaranteed by C., who afterwards pledged the gums for a valuable consideration to defendant, handing over to him the transfer order of plaintiffs, together with a transfer order from himself and afterwards, and before the bills became due, became bankrupt: Held, that the plaintiffs were entitled to maintain trover against defendant for the gums. *Boyson v. Coles* . . . 284

And see Goods, Sale of.

PRINCIPAL AND SURETY—1. Annuity—Giving time to grantee.—Giving time to the principal, the grantee of an annuity exonerates the surety from past, as well as future, arrears. *Eyre v. Bartrop* . . . 216

— 2. **Guaranty of overdraught—Amount in excess of guaranty—Change in obligee's firm.**—Bond by defendant as surety for W. & W. P. & Co., the obligees, were bankers, and W. & W. paper manufacturers, who had overdrawn their account with P. & Co. 4,822l., and had applied to P. & Co. to allow them for a time to overdraw such farther sums as they should require, so that the same, together with the 4,822l., should not

exceed in the whole at any one time 5,000*l.*, which P. & Co. had agreed to do. The condition was for the payment by W. & W. and defendant, or any of them, of the sum of 4,822*l.*, and also such farther sum as P. & Co. should or might thereafter advance to W. & W. in the course of their business, not exceeding in the whole 5,000*l.*: Held, not to be avoided by P. & Co. having allowed W. & W. to overdraw to an amount exceeding 5,000*l.*; for the restrictive words in the recital were not to be construed as conditional, that if obligees exceeded the amount the bond should be void.

Plea, that after the making of the bond, the partnership of P. & Co. was dissolved, and a new partnership formed, by the retiring of one of the old partners and admitting a new partner, and that at the time of the dissolution of partnership, a balance of 5,000*l.* was due from W. & W. to the partnership for such overdraft, but the partnership did not at any time demand payment of it, but, on the contrary, at and after the dissolution, discharged W. & W. therefrom, and consented that the balance should be, and it was, transferred to the account between W. & W. and the new partnership, and became incorporated in their account: Held, that the plea was ill, for an assignment of a chose in action is no discharge of an obligation. *Parker v. Wise* 359

PRINCIPAL AND SURETY—3. Mutual indemnity—Right of co-surety paying joint obligation to interest.—A. and B. by deed jointly and severally covenanted with C. to pay her an annuity during her life, and by another deed of the same date A. and B. covenanted with each other that each should pay one-half of the annuity, and indemnify the other against all actions, “damages, demands, sums of money and expenses, which might be incurred by reason of the non-payment thereof:” Held, that B. having in consequence of A.’s insolvency made several payments of A.’s moiety of the annuity, was not entitled to interest on the sums he had so paid. *Bell v. Free* 153

PROPERTY TAX—Tenant’s right to recover arrears from landlord. *See* Landlord and Tenant, 10.

RATE. *See* Taxes.

RECEIVER, of intestate’s estate, where administrator is insolvent. *See* Administration, 1.

RELEASE by co-plaintiff—Fraud.—Only upon a very strong case of fraud will the Court control the legal power of a co-plaintiff to release pending the action. *Jones v. Herbert* 520

REPLEVIN—Defect in declaration.—A declaration in replevin for taking divers goods and chattels of the plaintiff is bad for uncertainty.

And although judgment pass by default for the plaintiff, the defect is not cured by the statute of jeofails, 4 Ann. c. 16. *Pope v. Tillman* . . . 622

REVERSION—Sale by auction—Adequacy of consideration.—A sale of a reversion by public auction, held good, and the purchaser not bound to shew he has given the full value. *Shelly v. Nash* . . . 223

And see Vendor and Purchaser, 14.

RIVER. *See* Nuisance, 1.

ROAD, repair of. *See* Practice, 7.

SALE OF GOODS. *See* Goods, Sale of.

SCHOOL-HOUSE—Gift to establish. ' See Will, 3.

SCHOOLMASTER—Responsibility for injury to pupil. See Negligence, 2.

SECURITY FOR COSTS. See Practice, 4, 5.

SETTLEMENT (MARRIAGE)—1. **Covenant**—Money payable on death—Performance.—G. having by marriage articles covenanted that if he died in the life of his wife, his executors should within three months after his decease pay to her 3,000*l.*, and having by his will given all his property to his executors, in trust, after payment of his debts, at the expiration of three years from his decease, to divide it "in such ways, shares, and proportions as to them shall appear right," on his death during the life of his wife, the executors having died or renounced, his property is divisible according to the statute of distribution, and the widow's distributive share exceeding 3,000*l.* is a performance of the covenant in the marriage articles.

Distinction between satisfaction and performance. *Goldsmid v. Goldsmid* 60

— 2. **Voluntary limitations**—27 Eliz. c. 4.—Limitations in a marriage settlement to the brothers of the settlor, are *prima facie* voluntary and voidable under 27 Eliz. c. 4. *Johnson v. Legard* 234

— 3. — Limitations in a marriage settlement in favour of the issue of a second marriage by the settlor, held good against a purchaser for a valuable consideration; such limitations being interposed between the limitations to the sons of the first marriage and the daughters of such. *Clayton v. Earl of Wilton (or Winton)* 234

— 4. — J. L., in consideration of marriage and a marriage portion, settled his estate by lease and release to the use of himself for life, then to trustees to preserve contingent remainders; remainder to the use that the wife should receive a rent charge thereout for life for her jointure; remainder to the use of the first and other sons of the marriage in tail male; remainder to the use of the first and other sons of settlor by any future wife in tail male; remainder to the use of settlor's brothers respectively for life, and to their first and other sons respectively in tail male: Held, that none of the limitations to the brothers of the settlor were good as against a subsequent purchaser with notice. *Johnson v. Legard* 301

— 5. — A limitation in a marriage settlement, in favour of the issue of a second marriage by the settlor, was held good against a subsequent purchaser for valuable consideration. *Clayton v. The Earl of Wilton.* 307

— 6. — **Trust for "next of kin or personal representatives."**—In a marriage settlement monies belonging to the wife were settled, in default of appointment by her, in trust for her "next of kin or personal representatives," subject as to part to a trust for the husband for life: Held, that on the wife's death without exercising her power the husband was not entitled under the ultimate trust. *Bailey v. Wright* 151

And see Power, 2.

SHERIFF—1. **Fees.**—The table of fees prescribed by stat. 32 Geo. II. c. 28, s. 12, does not apply to the sheriff's fee for an arrest; and if he take a greater fee than by law allowed, debt lies on the statute for the penalty of 50*l.*, and the evidence of what the law allows is what, upon taxation by the master, it is the practice to follow. *Martin v. Bell* 354

— 2. **Neglect to have money in Court.**—An action on the case does not lie against a sheriff (who has not been ruled to return the writ) for neglecting to have the money in Court according to the exigency of a *fiari facias*. *Moreland v. Leigh* 786

SHIP AND SHIPPING—1. **Sale of**—Intention to carry out illegal adventure.—Where A. agreed to sell to B. one-third share of a ship, which was then to be employed on a joint adventure, in the exportation of military stores to South America, contrary to an order in council then in force: Held, that (the agreement being entire, and containing on the face of it an illegal stipulation), it lay on the party seeking to enforce the same to shew that means had been used to obtain a licence, or that the illegal purpose had been abandoned, and that in failure thereof A. could not recover for the share of the ship. *Holland v. Hall* 428

— 2. **Collision—Pilot Act.**—The Pilot Act, 52 Geo. III. c. 39, s. 30, which directs that no master or owner shall be answerable for loss or damage occasioned by misconduct or negligence of any pilot, does not confine the exemption to loss or damage happening to the piloted ship and cargo, but extends to damage done by that ship to others. *Ritchie v. Bousfield* . . . 490

— 3. **Duty of master to take care of seaman's goods.**—The captain of a vessel who carries the goods of another, though not for hire, is bound to take prudent care of them. And if he intermeddles with the chest of a seaman, who has been casually left behind, he is bound to restore it to its former state of security, particularly if the contents be valuable. *Nelson v. Macintosh* 766

— 4. **Owner's liability for money furnished to master.**—The owner of a vessel is liable for money supplied to the captain in a foreign port, provided the supply be absolutely necessary for the use of the vessel. *Rocher v. Busher* 742

— 5. **Owner's liability for stores ordered by supercargo.**—The owner of a ship is liable for stores and necessities supplied by the order of the supercargo, after the detention and liberation of the vessel by a foreign power, although the supplies are afforded after an abandonment by the owner to the underwriters; and although the supplies are furnished for the purpose of enabling the vessel to prosecute a second voyage, in the prosecution of which she is seized by British officers and confiscated, yet the institution of proceedings in the Admiralty Court by the defendant to recover possession of the vessel, amounts to an adoption of the second voyage, and renders him liable for the amount. *Mitchell v. Glennie* . . . 765

— 6. **Wages of seaman—Proof of freight having been earned.**—In an action for seaman's wages, it is not a part of the proof incumbent on the plaintiff, to shew that his ship earned freight.

If the defendant would disaffirm the plaintiff's right to wages, he must prove that the ship earned no freight. *Brown v. Milner* 493

— 7. **Admission of co-owner as to ownership.** See Evidence, 16.

SLANDER. See Defamation.

SOLICITOR AND CLIENT—1. **Costs—Lien—Inspection of documents.**—A solicitor discharging himself is not entitled to compel payment of his costs, by refusing to permit such inspection of the papers in his hands, or such production of them before the Court or the Master, as may be necessary in the conduct of the cause. *Commerell v. Poynton* 1

— 2. **Costs—Lien.**—The Court will not order the personal representative of a deceased solicitor to deliver the papers in the cause to another solicitor without payment, or security for payment, of the solicitor's bill. The summary jurisdiction of the Court extends to the representatives of a solicitor. *Redfearn v. Sowerby* 31

— 3. **Delivery of bill of costs.**—Previous to bringing an action on an attorney's bill, it is sufficient under the statute to deliver a bill at the defendant's last known apparent place of abode at the time when the b was delivered. And it is not sufficient for the defendant to shew that had another known place of abode, subsequent to the delivery of the bi *Wadson v. Smith* 7

SOLICITOR AND CLIENT—4. **Solicitor acting for parties having conflicting interests.**—A solicitor who has acted to a certain extent only for parties, defendants in a friendly suit in Chancery, will not be restrained from acting in a cause by bill filed by some of those defendants against others of them, if he is not confidentially possessed of any secrets which might be used to the prejudice of such other defendants, or has knowledge of any facts unknown to his clients. *Robinson v. Mullett* 723

And see Practice.

SPECIFIC PERFORMANCE—Contract for personal Service. *See Contract, 4.*

And see Vendor and Purchaser.

STAMP. *See Bill of Exchange, 2; Evidence, 7, 11, 14.*

STOCK—Undertaking to replace on particular day.—In an action for not replacing stock on a particular day, the plaintiff may estimate his damages according to the price of the stock at the time of the trial. *Downes v. Bach* 772

SURETY. *See Principal and Surety.*

TAXES—Action to recover sum overpaid—Notice of action.—Assumpsit for money had and received, brought to recover the amount of an excessive charge made by the defendants as collectors, on a distress for arrears of taxes: Held, that the defendants were not entitled to a month's notice before action brought, under stat. 43 Geo. III. c. 99, s. 70, which provides that no writ or process shall be sued out for anything done in pursuance of that Act, till after one month's notice. *Umphelby v. M'Lean* . . . 423

And see Income Tax; Landlord and Tenant, 10.

TENDER—Of joint debt—Subsequent demand made to one debtor.—After a tender of what is due from two persons on a joint contract, a subsequent application to one of them, is sufficient to support a replication to a plea of tender, that the plaintiff subsequently demanded payment from the defendants. *Peirse v. Bowles* 775

TITHE—Evidence of title to. *See Evidence, 15.*

TOLL—Custom.—A toll of reasonable amount may be claimed by custom. In an action on the case upon a custom for not grinding at plaintiff's mills, plaintiff may declare generally upon the custom for a certain toll, without specifying the particular toll, or the consideration for it, or that it is a reasonable toll; and a continuance of uniform payment and acquiescence is evidence of its reasonableness, and the Court shall judge under all the circumstances what is reasonable. *Gard v. Cullard* 310

TORT. *See Carrier, 1; Negligence; Nuisance.*

TRESPASS—1. **Hunting—Damage by joint trespassers.**—In an action of trespass against a huntsman for hunting over the lands of another, damages may be recovered, not only for the mischief immediately occasioned by the defendant himself, but also for that done by the concurrence of people who accompanied him. *Hume v. Oldacre* 779

— 2. **Injury to person riding in another's carriage.**—It is a direct trespass to injure the person of another by driving a carriage against the carriage wherein that person is sitting, although the last-mentioned carriage be not the property nor in the possession of the person injured. *Hopper v. Reeve* 629

TRESPASS—3. **Limitation of action.**—Trespass for breaking and entering coal-mines and taking away coals. Plea, *actio non accrevit infra sex annos*. To which the plaintiff replied in the affirmative. At the trial no evidence was given to shew that the trespass was actually committed within six years: Held, that evidence of a promise to make compensation, made by defendant before the commencement of the action, and when he was threatened with an action for taking away coals, was not sufficient to support this issue; by which the plaintiff was bound to prove that he had a good cause of action within six years before the commencement of the suit. *Hurst v. Parker* 440

TROVER AND CONVERSION—**Removal of another's chattel by possessor of land.**—One who comes into possession of land, on which he finds a block of stone belonging to another, is not justified in removing it to a distance.

And such removal supersedes the necessity of proving a formal demand in an action of trover. *Forsdick v. Collins* 757

TRUST—1. **Costs of trustee.**—A trustee is entitled to his costs, unless he acts from motives of obstinacy and caprice. *Taylor v. Glanville* . . 210

— 2. **Separate claim of transferee of share in trust fund.**—The owner of an aliquot share in a trust fund of ascertained amount has a separate claim against the trustees of the fund for a transfer of such share. *Smith v. Snow* 186

And see **Power; Settlement (Marriage); Will.**

UNDUE INFLUENCE. See **Deed, 1.**

VENDOR AND PURCHASER—1. **Auction—Sale in several lots.**—Where different lots are sold at an auction for different sums, the contracts are separate, both in law and fact. *James v. Shore* 798

— 2. **Defective title—Indemnity.**—A purchaser cannot be compelled to accept a defective title with an indemnity against the defect, unless such defect consists of a definite pecuniary liability against which the proposed indemnity will be a complete protection. *Fildes v. Hooker* 214

— 3. — The vendor of an estate having lost his title deeds agreed to give the vendee a real security against such loss.

The vendee, on a bill for a specific performance of the agreement, stated he had not real property sufficient for such security, but offered ample personal security: Held, vendor was bound to procure a sufficient real security. *Walker v. Barnes* 226

— 4. **Costs.**—A purchaser making a fair objection to a title will not be decreed to pay costs. *Aislavie v. Rice* 230

— 5. — **Delay in completion—Deterioration in land.**—The completion of a contract being delayed for three years by difficulties in the title, the vendor held accountable for a deterioration of the land during that period. *Foster v. Deacon* 251

— 6. — **Purchaser in possession continuing to treat.**—A purchaser who has entered into possession without knowledge of the title, and afterwards, having discovered a defect in the title, remains in possession and continues to negotiate with the vendor, cannot rescind the contract merely on account of delay in completing the title. *Warde v. Jeffery* . . . 716

— 7. — **Voluntary limitations in settlement.**—Held, that limitations in a marriage settlement to the brothers of the settlor and their issue were voluntary, and were not good as against a subsequent purchaser with notice. *Johnson v. Legard* 301

— 8. — **Limitation in favour of issue of second marriage good against subsequent purchaser.** *Clayton v. Earl of Wilton* 307

VENDOR AND PURCHASER—9. Costs—Recovery of interest on deposit on failure of vendor to deduce title.—Where the purchaser at an auction of a reversionary interest, upon failure of the vendor to deduce a title, had recovered back the deposit in an action against the auctioneer, held that he might nevertheless recover interest on the deposit in an action against the vendor for not completing his contract, under an averment as special damage that the plaintiff had lost, by reason of the non-performance, the interest and benefit of the money. *Farquhar v. Farley* . . . 599

— 10. — An auctioneer is the agent as well of the purchaser as of the vendor; and if the vendor commence an action against him for the recovery of the deposit, he may file a bill of interpleader, for the purpose of ascertaining to whom it belongs. *Fairbrother v. Prattent* . . . 731

— 11. **Equitable interest.**—An equitable interest under a contract of purchase may be the subject of sale; the sub-contract converts the original vendee into a trustee of his equitable interest for his vendee, who acquires the same rights which he had to the benefits to be derived under the primary contract. Such sub-contracts are not within the doctrine of champerty and maintenance. *Wood v. Griffith* . . . 18

— 12. **Imputed notice.**—The purchaser of an underlease is not bound to make any enquiry respecting the custody of the superior lease, and is therefore not affected by any equities arising out of the deposit of the superior lease prior to the creation of the underlease. *Mountford v. Scott* 189

— 13. **Inadequate consideration—Purchase by steward.**—A land agent or steward is not incapacitated to purchase of his employer, and the sale, though beneficial to the purchaser, will not be set aside in equity if there was no imposition on the part of the agent, and no concealment as to the value. Bill charging such agent, and another defendant, the plaintiff's solicitor, with fraudulently combining to procure the estate for the agent at an undervalue, dismissed with costs; the charge of fraud not being proved. *Andrews v. Mowbray* . . . 166

— 14. — **Sale by tenant for life and remainderman in distress.**—A tenant for life, with a remainderman in tail, both in distress, join in selling the estate for an inadequate consideration: Held, that it could not be considered as the sale of a reversionary interest, and subject to the rules relating to sales of such interests; but that the sale was invalid, on account of the inadequacy of the consideration, coupled with the distress of the vendors, and their want of advice. *Wood v. Abrey* . . . 264

— 15. **Mistake—Rescission of contract.**—A vendor is bound to know that he actually has that which he professes to sell. And even though the subject-matter of the contract be known to both parties to be liable to a contingency which may destroy it immediately, yet if the contingency has already happened, the agreement will be void.

The execution of a bond for securing the payment of the purchase-money is not a completion of the contract, and where fraud is made out the Court will relieve against it. *Hitchcock v. Giddings* . . . 725

— 16. **Purchase-money—Payment into Court.**—A purchaser in possession making improvements, &c., but objecting to the title, not obliged to pay purchase-money into Court. *Gell v. Watson* . . . 219

— 17. **Vendor in possession—Interest on rents.**—On a bill by a purchaser for specific performance of a contract for the sale of an estate, a vendor who, during fifteen years, had retained possession of the whole estate, and of one-third of the purchase money, was, under the circumstances, charged with interest on one-third of the rents and profits. *Todd v. Gee* 70
And see **Reversion**.

WARRANT OF ATTORNEY AND COGNOVIT—1. A *cognovit* given after process sued out, and before declaration is good.

The rule requiring the presence of an attorney for the defendant upon the giving of a warrant of attorney by a defendant in custody, extends to *cognovits*. *Webb v. Aspinall* 631

WARRANT OF ATTORNEY AND COGNOVIT—2. Given by two

—**Death of one.**—If two warrant an attorney to confess judgment against them, and one dies, judgment cannot be entered up against the other. *Raw v. Alderson* 535

WASTE—A tenant in tail restrained by statute from barring issue and those in remainder, is not thereby brought within the principle of equitable waste.

The Duke of Marlborough, for the time being, is, under the Act of the 5th Anne, c. 3, bound to maintain Blenheim House, and is not therefore at liberty to cut trees which are essential to its ornament or shelter. *Attorney-General v. Duke of Marlborough* 273

WILL—1. "All my messuage, farm and lands, called C. farm"

—**Piece of land excepted from successive leases of farm.**—Devise of "my messuage, farm, and lands, called C. farm, situate in or near the parishes of D., W., and T., now on lease to F., at the yearly rent of 150*l*." A close in the parish of D., heretofore arable and part of C. farm and occupied with it by the lessee thereof, but for thirty-three years past sown with acorns, and occupied by the owner, and excepted out of two leases of C. farm, one prior, the other posterior to the date of the devise, passes by the devise as parcel of C. farm. *Down v. Down* 495

—**2. Annuity—Option to executors.**—A direction by a testator, that his executors shall pay an annuity, unless circumstances render it unnecessary, inexpedient and impracticable, means unless in the opinion of his executors circumstances shall so render it. The judgment of the executors in this respect is not controllable by a court of equity, unless they act *malâ fide*. *French v. Davidson* 253

—**3. Charity—Mortmain.**—A bequest of 7,100*l*. to be laid out in the funds, and the interest and dividends to be applied in providing a proper school-house, held to be a good charitable bequest, as a school-house might be hired. A bequest of residue for the benefit of such public and private charities as the executors may think fit, and amongst others to establish a life-boat at Brighthelmstone, held good. Money on mortgage and a lease did not pass, as being void under the statute, but fixtures in the house, which was held on lease, formed part of the residue and passed. *Johnston v. Swann* 270

—**4. Election.**—The equitable rule of election operates by way of compensation and not of forfeiture.

A partially disappointed devisee may be compensated *pro tanto*.

Infants being bound to elect to take under or against a will, reference to the Master to inquire which was for their benefit. *Gretton v. Haward* 95

—**5. "In case of the death."**—The words "in case of the death," construed to refer to death in the life of the tenant for life. *Galland v. Leonard* 44

—**6. Legacy—Exemption of general personal estate.**—The general personal estate exempted from the payment of a particular legacy.

In the event of the deficiency of a particular fund appropriated to the satisfaction of certain bequests, the Court, on the question of the exemption of the general personal estate, cannot advert to the fact of a sale of part of the testator's property subsequent to the will, by which the particular fund has become insufficient. *Gittins v. Steele* 7

—**7. — Disposition of revoked legacy.**—A testator having, by his will, directed his executors to transfer 500*l*., part of his residuary estate, to

H. N., and made a specific disposition of the other parts, and having afterwards drawn a pen through the name of H. N., and by a codicil declared that he razed her name out of his will with his own hand; the 500*l.* is undisposed of, and belongs to his next of kin. *Skrymsher v. Northcote* . 142

WILL—8. Legacy—Lapse.—A legacy to A. as one of a class of 600*l.* to be paid at the end of one year after the testator's death, or to their several and respective heirs, held to have lapsed by the death of A. in the life-time of the testator. *Tidwell v. Arid* 259

— 9. — **Refunding legacy paid by mistake—Interest.**—On refunding sums paid under an erroneous construction of a will, a legatee entitled to other funds making interest in the hands of the Court is to be charged with interest: not a legatee who has no further concern in the estate. *Gittins v. Steele* 57

— 10. — **"Without deduction"—Legacy duty.**—A testator having directed legacies to be paid at the expiration of six months, after his decease, without deduction, the legatees are entitled to the full amount, and the legacy duty must be paid by the executors. *Barksdale v. Gilliat* 139

— 11. **Transposition of words.**—Testamentary papers in this form:—"I leave and bequeath to all my grandchildren, and share and share alike;" and "farther, I appoint T. H. and T. E. my trustees for all my grandchildren and nieces:" are void for uncertainty, and pass no interest in the real estate. *Mohun v. Mohun* 58

— 12. **Trust for maintenance—No children.**—Under a bequest of stock, in trust to pay the dividends to M. H. H., the niece of the testator, "for and towards the maintenance, education, bringing up of all and every the child and children of the said M. H. H. until he, she, or they shall attain twenty-one," then to transfer the principal equally among the children, with a bequest over in default of such issue, to the nephews and nieces of the testator living at the death of M. H. H.: The dividends are payable to M. H. H., although she has no child. *Hammond v. Neame* . . . 15

— 13. **Vested gift to two as tenants in common—Contingency.**—Bequest to A. for life, and afterwards to B., but if he should be then dead, to C. and D. in equal shares, or the whole to the survivor of them. B. died in the life of the tenant for life, as did also C. and D.: Held, that the gift to C. and D. was a vested interest in them as tenants in common, subject to be divested if one only should survive the tenant for life. *Broune v. Kenyon* 261

And see Partnership, 7; Power, 1, 3; Settlement (Marriage), 1.

WORDS—"All my message, farm and lands called C. farm." *See Will, 1.*

— "In case of the death." *See Will, 5.*

— "Next of kin or personal representatives." *See Settlement (Marriage), 6.*

— "Persons residing in Great Britain." *See Income Tax.*

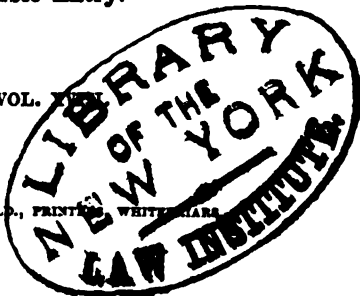
— "Stranding." *See Insurance (Marine), 12.*

— "Without deduction." *See Will, 10.*

WRIT of restitution. *See Forcible Entry.*

END OF VOL. IV.

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